Supreme Court, U. S.
FILED
JUL 25 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-135

SHUMATE & COMPANY, INC., and GASTON A. SHUMATE, Individually,
Petitioners,

v.

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., and
SHEARSON, HAMMILL & COMPANY, INC.,
Respondents.

No. .....

SHUMATE & COMPANY, INC., and GASTON A. SHUMATE, Individually,
Petitioners,

v.

AMERICAN STOCK EXCHANGE, NEW YORK STOCK EXCHANGE, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Fifth Circuit

B. THOMAS McELROY
2505 Republic National Bank Tower
Dallas, Texas 75201
Attorney for Petitioners

Of Counsel
WHITE, McELROY, WHITE, SIDES & RECTOR
PEVERIL O. SETTLE, III
2505 Republic National Bank Tower
Dallas, Texas 75201

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

SPECIAL ADDENDUM TO THE PETITION

Following the preparation of this petition, on June 26, 1975, this Honorable Court handed down its decisions in *United States v. National Association of Securities Dealers* [1975 Trade Cases ¶ 60,366] — U.S. — (1975) (No. 73-1701), and *Gordon v. New York Stock Exchange, Inc.* [1975 Trade Cases ¶ 60,367], — U.S. — (1975) (No. 74-304).

In the former case, the Court held that "activities allegedly constituting a horizontal conspiracy between the NASD and its members to 'prevent the growth of a secondary dealer market and a brokerage market in the purchase and sale of mutual fund shares' " are, in light of active SEC supervision as authorized by the Maloney Act, accorded an implied immunity from the antitrust statutes. In the latter opinion, the Court held that a system of fixed rates for brokerage commissions, as promulgated and enforced by the New York Stock Exchange, which would otherwise constitute a *per se* violation of the antitrust laws, is accorded implied immunity not only due to the presence of active SEC supervision, but further for the reason that such activity is contemplated under the Securities Exchange Act of 1934.

While, at first blush, the holdings in these two cases might appear applicable to the conduct to which the instant case relates, any such impression would be fleeting at best, for neither decision embraces Respondents' conduct.

Here there is *no* evidence of active Commission supervision prior to the "non-disapproval" of the proposed exclusion of listed securities from NASDAQ at inception, as communicated first by Chairman Budge's phone call to NASD President Macklin on October 22, 1970, and then by letter from Chairman Budge to Macklin dated October 30, 1970. Indeed, Chairman Budge is attributed to have said that the matter had *never* been

considered by the Commission prior to Macklin's oral request in his meeting with Chairman Budge on October 20, 1970. This is to be distinguished from the activities of the Division of Trading and Markets of the SEC concerning the question, as reflected by the chronology set forth in its memorandum to the Commission dated August 12, 1970 (P. Ex. 2). There is no evidence concerning what facts, contentions, or considerations were taken up in the Commission deliberations, if any, or as to the immediacy of the inquiry as put before the Commission. Cf. *Thill Securities Corp. v. New York Stock Exchange* (7 Cir. 1970), 433 F2d 264, at 270, cert. den. 401 U.S. 994 (1971), and as noted in *Gordon v. New York Stock Exchange*, supra.

Here there is no indication that the Commission was in a position to appreciate the viability of Respondents' submissions proposing exclusion, for the reason that there is no showing that the Commission was apprised (1) of the views of the NASD membership as a whole, (2) of the absence of discussion of the proposal at any recent NASD Board of Governors meeting or NASD convention, or (3) that NYSE President Haack, as he now asserts, consulted only one other person before writing "The Exchange is deeply concerned . . .".

This is not to say that the Respondents should be prohibited from stating their respective views on this or any other matter to the Commission, or that the Commission should not consider, and indeed rely, on such expressed opinions, but such expressions must be viewed as being essentially private in nature when made in a private manner, especially in the instance of an opinion "expressed" by an executive of the NASD which is at fundamental variance with the expressed opinion of a majority of NASD members.

There is no evidence that the Commission itself weighed "competitive concerns in the exercise of its . . . responsibility," and, in any event, it could not have done so at length or to any great extent under the facts here presented. Cf. *U. S. v. National Association of Securities Dealers, Inc.*, supra, and *United States v. Philadelphia National Bank*, 374 U.S. 321 at 350-352, 83 S.Ct. 1715 at 1734-1736 (1963).

There is further no showing that the manner in which the Respondents conducted themselves was necessary to make either the Exchange Act or the Maloney Act work. Indeed, the proposition . . . that what is urged to have been an altogether legitimate objective must by needs, *or by preference*, be obtained by a means so out of the public view, and in such a way as to preclude the presentation of views by other interested and/or affected parties, and that such procedure is one either necessary or desirable to effect the purpose or operation of the Exchange Act and/or the Maloney Act . . . smacks of a philosophy inimical to the roots of an economic system those same Acts are intended to protect.

Finally, in both *Gordon*, supra, and *U.S. v. NASD*, supra, this Court held that the pervasive regulatory scheme established by the Exchange Act and Maloney Act displaces the Sherman Act [and Clayton Act] for the reason that otherwise "duplicative and inconsistent standards" would result. "Duplicative and inconsistent standards", on the other hand, is precisely what has already resulted in the third market by virtue of the application of Article III, Section 1 of the NASD Rules of Fair Practice to non-Exchange affiliated third market broker-dealers, and non-application of the same Rule to Exchange affiliated NASD members.

In light of these two recent decisions by this Honorable Court, and the construction that might otherwise be accorded Respondents' conduct thereunder (which conceivably may even encourage Respondents to continue a pattern of conduct so collusive, elitist and *ex officio* in nature, without due regard or fair consideration of others), it is most appropriate, indeed crucial, that a Writ of Certiorari should issue herein.

INDEX

Page

Citation to Opinion Below 2

Jurisdiction 2

Questions Presented 2

Statutes Involved 3

Statement 3

How a Federal Question is Presented 18

Reasons for Granting the Writ 19

Conclusion 31

Certificate of Service 31

Appendix A—Opinion Below of United States Court of Appeals for the Fifth Circuit A-1

Appendix B—Orders and Judgment of Lower Courts:

(1) Judgment of District Court dated December 6, 1973 .....A-18

(2) Letter from Clerk, United States Court of Appeals for the Fifth Circuit dated March 31, 1975 advising of Order entered that day denying Petition for Rehearing A-20

(3) Order denying Petition for Rehearing dated March 31, 1975 .....A-22

Appendix C—Portion of Transcript of Proceedings Containing District Court's ruling on Motion for Directed Verdict A-23

Appendix D—Statutes and Rules Involved:

(1) § 4 of the Clayton Act, 15 U.S.C. § 1 ..... A-26

(2) § 4 of the Clayton Act, 15 U.S.C. § 15 ..... A-28

(3) Rule 23 of the Federal Rules of Civil Procedure, as amended A-29

Table of Cases

Abrams v. United States, 250 U.S. 616 at 630, 40 S.Ct. 17 31

Bigelow v. R.K.O. Radio Pictures, 327 U.S. 251, 66 S. Ct. 574, 90 L.Ed.2d 652 28

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L.Ed.2d 642 21

Conference of Studio Unions v. Loew's Inc., 193 F.2d 51, 54-55 (9th Cir. 1951), cert. denied 342 U.S. 919, 72 S.Ct. 367 (1952) 30

Eastman Kodak v. Southern Photo Materials Co., 273 U.S. 359 at 379, 47 S. Ct. 400 27

Eastern Railroad Presidents Conference, v. Noerr Motor Freight, Inc., 375 U.S. 127, 81 S. Ct. 523 21

Hughes Tool Company v. Trans-World Airlines, Inc., 409 U.S. 363, 93 S. Ct. 647, 34 L.Ed.2d 577 21

Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, at 212, 79 S. Ct. 705, at 709, 3 L.Ed.2d 741 .....25, 30

Northern Pacific Railway Co. v. United States, 356 U.S. 1, 78 S. Ct. 514, 2 L.Ed.2d 545 25

Otter Tail Power Company v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L.Ed.2d 359 21

Ricci v. Chicago Mercantile Exchange, 409 U.S. 298, 93 S. Ct. 573, 34 L.Ed.2d 525 21

Silver v. New York Stock Exchange, 373 U.S. 341, 83 S. Ct. 1246 .....19, 22, 29

Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555, 51 S. Ct. 248 28

Temken Roller Bearing Company v. United States, 341 U.S. 593, 71 S. Ct. 971, 95 L.Ed. 1199 25

United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S. Ct. 1585 21

United States v. Radio Corporation of America, 358 U.S. 334, 79 S. Ct. 457, 3 L.Ed.2d 354 21

United States v. Topco Associates, Inc., 405 U.S. 596, 92 S. Ct. 1126, 31 L.Ed.2d 515 25

White Motor Co. v. U.S., 372 U.S. 253, 83 S. Ct. 696, 9 L.Ed.2d 738 25

Wolfe v. National Lead Co., 15 F.R.D. 61 (N.D.Cal. 1953), aff'd. 255 F.2d 427 (9th Cir.), cert. denied, 350 U.S. 915, 76 S.Ct. 198 (1955) 30

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. .....

SHUMATE & COMPANY, INC., and GASTON A. SHUMATE, Individually,
Petitioners,

v.

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., and
SHEARSON, HAMMILL & COMPANY, INC.,
Respondents.

No. .....

SHUMATE & COMPANY, INC., and GASTON A. SHUMATE, Individually,
Petitioners,

v.

AMERICAN STOCK EXCHANGE, NEW YORK STOCK EXCHANGE, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Fifth Circuit

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on March 5, 1975.

CITATION TO OPINION BELOW

The Opinion of the Court of Civil Appeals for the Fifth Circuit, printed in Appendix "A" herein, is reported in — Fed.2d —.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on March 6, 1975. Rehearing was denied on March 31, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Did the lower Courts err (having agreed and assumed for the purpose of considering Respondents' Motion for Directed Verdict that the Respondent National Association of Securities Dealers, American Stock Exchange, and New York Stock Exchange conspired to violate the Federal anti-trust statutes by excluding listed securities from the NASDAQ electronic quotation system at its inception) in failing to recognize (or, alternatively, to make any determination whatsoever) that such conspiracy constituted a *per se* violation, whereby injury and causation are presumed?

2. Did the lower Courts err in failing to determine whether the conduct complained of would, if true, as a matter of law constitute a *per se* violation of the Federal anti-trust statutes, whereby injury and causation would be presumed, in denying Petitioner class action status on behalf of all NASD members who are not also members of the AMEX or NYSE, by concluding that the controlling question as to liability was whether a

class member had suffered injury, and thereby concluding further that in the instant case the proof of injury to business or property of each class member would be critical for the determination of Respondents' liability to such member, and thereby further concluding that for such reason individual questions concerning fact and extent of injury would preempt or predominate any common question of liability?

STATUTES AND RULES INVOLVED

This case involves § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1; and § 4 of the Clayton Act, 15 U.S.C. § 15.

With respect to the second question presented, Rule 23 of the Federal Rules of Civil Procedure, as amended, is also involved.

All are set out at length in Appendix C.

STATEMENT OF THE CASE

Petitioner Shumate & Company, Inc. was formed in the year 1955 by Petitioner Gaston A. Shumate to engage in the securities business, and such firm is today, as it has been from the beginning, a small over-the-counter brokerage firm, functioning as a member of the Respondent National Association of Securities Dealers (NASD) but not having a seat with either the Respondent New York Stock Exchange (NYSE) or the Respondent American Stock Exchange (AMEX). Petitioners engage in the sale of unlisted securities and also in the sale of so-called "third market" securities, being those transactions off the floors of the two said national exchanges but in securities listed on either such national exchange. In 1970, third market trading by over-the-counter firms accounted for about 3.4% of the dollar volume on the New York Stock Exchange.

The NASDAQ system is the automated quotations system developed by the Bunker-Ramo Corporation in consultation with Arthur D. Little, Inc., a research firm of Cambridge, Massachusetts and paid for by the general membership of the Defendant NASD, including Petitioners. It is a revolutionary communications system for the rapid display on closed circuit television screens in offices of NASD members nationwide of market information concerning all stocks, listed and non-listed, traded over-the-counter, and it is also itself potentially a nationally centralized automated marketplace.

For two years prior to the climactic events giving rise to this lawsuit, the NASDAQ system was anticipated and scheduled to include third-market securities, or those securities listed on the exchanges which are also traded over-the-counter The New York and American Stock Exchanges do not own the securities they list, but simply provide exchange members a place where they can get together to do business. Therefore, it was entirely reasonable that on December 16, 1968, the full membership of Respondent NASD by written vote overwhelmingly adopted by-laws to implement the NASDAQ system providing that third-market securities could be included when the service was made available. From that point on, and without equivocation, Respondent NASD stated in any and all public statements, and in any and all statements to its general membership, that no discrimination would be practiced by such Respondent in making available the NASDAQ system to listed securities enjoying an active over-the-counter market. As of June, 1970, the NASD by-laws provided that market quotations of competing dealers on securities available to NASDAQ would include those securities "listed on the national securities exchange registered under § 6 of the Securities Exchange Act, and held of record by 300 or more persons." Provisions of the NASD by-laws making listed securities eligible for quotation on NASDAQ were filed with the Securities and Exchange Commission on June 5, 1970, and a revised schedule was filed with the Securities and Exchange

Commission which still included listed securities. On August 26, 1970, the NASD by-laws with the provision of permitting listed securities to be quoted through NASDAQ became effective under § 15 of the Securities Exchange Act of 1934. No mention of the exclusion of listed securities from the NASDAQ system at its inception was even suggested at the Pebble Beach, California, meeting of the Board of Governors for Respondent NASD in September, 1970.

Shortly thereafter, however, on October 9, 1970, the AMEX President, Ralph Saul wrote (P. Ex. 19) to the Securities and Exchange Commission and Respondent NASD seeking to have listed securities eliminated from NASDAQ. Four days later on October 13, 1970 (P. Ex. 20), the NYSE President, Robert W. Haack joined in urging the elimination of listed securities from NASDAQ at start-up.

Within one (1) week, and by October 20, 1970, the President of the Respondent NASD, Gordon Macklin, joined with Saul and Haack seeking to eliminate third-market securities from NASDAQ and met with the SEC Chairman Hamer H. Budge for that purpose. In that meeting, Macklin and Mr. Lloyd Derrickson, General Counsel for Respondent NASD, met with Chairman Budge individually, who requested that the NASD submit a letter stating the reasons for the proposed exclusion.

On the following day, October 21, James W. Walker, Vice President in charge of legal affairs of Respondent AMEX, "dropped in" and "visited with" Macklin at the request of AMEX President Saul, while in the city on other business.

On the next day, October 22, 1970, the Executive Committee of Respondent NASD had what has been termed a "telephone" meeting and reversed its own stated policy of the two prior years by voting to exclude listed securities from NASDAQ, all six (6) members of such Executive Committee casting these important

"telephone votes" being, incidentally, at such time otherwise employed or associated with member firms of the NYSE.

In a letter dated October 22, 1970, Macklin wrote Chairman Budge stating ". . . we believe that listed securities should not be included in the system at start-up." Just who the term "we" refers to is nowhere specified in the letter, although an inference might be raised that it refers to the NASD as a whole, or the NASD Board of Governors.

However, the NASD Board of Governors as a group was not approached until October 23, 1970, when Macklin and/or other officers of the NASD solicited by phone and by mail the ratification of the full board of Governors of the action of the Executive Committee excluding listed securities from NASDAQ. At such time, the Board of Governors was almost entirely "incidentally" composed of persons employed or otherwise associated with exchange member firms, such firms comprising only about 1,366 members of the NASD compared to the full membership of approximately 4,348 and could be considered to be not entirely representative of the full membership of the Respondent NASD. Not altogether unexpectedly, such action was ratified by the NASD Board of Governors.

During this crucial period, neither Macklin nor the Executive Committee of the NASD Board of Governors, nor the NASD Board of Governors itself advised the public generally, or the non-exchange affiliated NASD members specifically, that they were seeking to have listed securities deleted from NASDAQ at its inception, nor had any indication of such contemplated action been afforded the NASD members generally in the preceding two years.

On October 22, 1970, Macklin was advised by phone by Chairman Budge that the Securities and Exchange Commission "would not disapprove" a decision by the NASD to take listed securities off NASDAQ for the cited reason that the NASD

wanted to gain operating experience in the operation of the NASDAQ system without feared technical problems attributed to the inclusion of listed securities. At such time, it was estimated by Macklin that some twelve (12) months' operating experience would be necessary to permit NASD "to make a definitive judgment as to inclusion of listed stocks." (P. Ex. 21) On the same day, October 22, 1970, Macklin called Robert Haack, President of the NYSE and in part advised Mr. Haack that Chairman Budge had indicated that the Commission would not disapprove an NASD decision excluding listed securities from NASDAQ at inception.

However, announcement was not made to the public generally, or to the NASD membership, including the approximately 2,982 non-exchange member firms, that listed securities would be excluded from NASDAQ at inception, nor that such course of action was being considered, until the decision had already been made and ratified by telephone and mail vote, 20 to 2, by the NASD Board of Governors, the two negative votes being cast by governors who had no affiliation with an exchange member firm. Such decision was arrived at without a full meeting of the NASD Board of Governors, or without any hearing or poll of the NASD membership at large, and without opportunity for other NASD members to voice their views before either a governing body of the NASD or the Securities and Exchange Commission.

The prime concern of the two respondent national exchanges, and of the Respondent NASD, which at all times material hereto had as representatives on both its Board of Governors and its Executive Committee predominately persons who at the same time were employed in some capacity by exchange member firms, was that NASDAQ would make it easier for investors to trade listed securities carried on the NASDAQ system in the third-market rather than on the floor of the two national exchanges, with its rapid display of investment data on such securi-

ties, with the resultant loss of commissions to exchange members and specialists. In effect, the Respondent Exchanges simply feared the competition of another marketplace, namely, the newly conceived, technically advanced, computerized NASDAQ system, which would potentially make such investment data simultaneously and instantaneously available to customers and brokers in the approximately 2,982 non-exchange NASD member firms across the country.

On February 8, 1971, NASDAQ began operations with quotations for non-listed over-the-counter securities only. Some eight weeks later, considerably short of the twelve month period it had been estimated it would take to "iron out" technical problems, the NASD began a "test period" with the inclusion of thirty-two listed stocks. Perhaps coincidentally, such trial period began following the filing of Petitioners' initial complaint herein. It should be noted that all of the listed securities for which inclusion had theretofore been requested, including two requested by Petitioners, were carried in NASDAQ during such "test period". Thereafter, and again considerably short of the twelve months' operational experience indicated, listed securities were formally incorporated as a part of the NASDAQ quotation system.

In the two instant suits Petitioners charge that Respondents National Association of Securities Dealers, Inc., Shearson, Hammill & Company, Inc., American Stock Exchange, and the New York Stock Exchange conspired in violation of Federal antitrust laws first to exclude and then to boycott on the NASDAQ system trade in those securities listed on the New York and American Stock Exchanges.

In a third suit (Shumate v. New York Stock Exchange, et al, being Civil Action No. 3-4663-D, in the same District Court), Shumate charges that Rule 394 of the NYSE and Rule 5 of the AMEX violate said antitrust laws because they prevent

exchange members from dealing in listed securities off the floor of said exchanges with non-exchange brokers, except under exceptional circumstances.

The class Shumate seeks to represent in these actions is the over-the-counter brokerage industry, composed, like Shumate, of all members of the NASD who are not members of the NYSE or AMEX. This class numbers approximately 2,982 firms, each of which is indentifiable upon the membership rolls of the NASD.

On December 28, 1970, Petitioner Shumate & Company, Inc.'s first motion for an Order under Rule 23, F.R.C.P., that the suit may be maintained as a class action was filed. Not until April 26, 1973, did the Trial Court file its Class Action Order, ruling that this litigation might not be maintained as a class action.

Also on December 28, 1970, Petitioner Corporation filed its Notice to Take Oral Depositions of Robert M. Haack, President of the New York Stock Exchange, and of Ralph S. Saul, President of the American Stock Exchange in New York City. Not until September 24, 1973, in New York was Petitioner permitted to take the deposition of Haack on the merits, and not until October 15, 1973, also in New York, on a return trip, was Petitioner permitted to take the deposition of Saul on the merits, although very restricted depositions of each witness had been permitted pertaining to earlier Motions of Respondents.

On February 26, 1971, Petitioner filed a Motion for a Temporary Injunction on which it was never able to get a setting.

All discovery on the merits was suspended in the case by order of court entered October 28, 1971, and such Order was not set aside until July 12, 1973, on Motion of Petitioner after

receiving Notice of trial setting. Then ensued the balance of the summer months during which Petitioner was unable to get firm dates vis-a-vis Respondents on the taking of oral depositions, so that the effective period of discovery on the merits in this antitrust suit was somewhat curtailed to say the least. So frantic were the final two months prior to trial that at least 27 different pleadings, motions, orders and briefs were filed during such time. Yet, Petitioners' Motion for Leave to File an Amended Complaint, with such Amended Complaint attached, filed originally on April 6, 1971 (after the filing of an earlier February 1, 1971, pleading had been inexplicably disallowed) was not ruled on until the 6th and last day of trial on the merits, when it was denied. (TR. 1012)

When trial got under way on October 29, 1973, the Court had to tell counsel what issues were considered to have been joined by the pleadings, as the Trial Court permitted Pre-Trial Orders prepared by each side to be filed. (TR. 11) Respondents' Motion in Limine was in large part sustained (TR. 25, 26), such ruling prohibiting references to Rule 394 of the NYSE and Rule 5 of the AMEX, so much a part of the overall litigation as really to suggest or require consolidation of all three (3) cases, for the reason that the best execution rule requiring a broker to get the best possible market for his customer is not fully served simply by his observing on a TV screen where the best market is, if the broker is not then permitted to go off the floor of a national exchange to consummate a transaction when the best market is in fact off such floor. The Court's ruling on the Motion in Limine also prohibited reference to legal opinions of Respondent NASD's own counsel made known to third parties, in or prior to October, 1970, that the actions of Respondents in keeping listed securities off NASDAQ was violative of the antitrust laws, having at the same time denied Petitioners' Motion for Production of such legal opinions, as previously filed on September 28, 1973.

The Transcript of Proceedings of the trial extends for 1,042 pages. Witnesses included George Reycraft, an attorney of New York City, who testified that at a meeting attended by him and representatives of certain of the Respondents, the point was plainly made that there would be no technical problems if listed securities were placed on the NASDAQ system. (TR. 67 et seq.) The absence of technical problems was also well shown in answers of Respondent NASD to Petitioners' Interrogatories (TR. 101, et seq.). Yet when Shumate first called Macklin, the NASD President, upon learning listeds were to be taken off, the reason assigned by Macklin was "technical" problems! (TR. 701)

Petitioners' Exhibit "1" duly introduced, was a copy of the Operating Agreement dated December 17, 1968, between the Respondent NASD and Bunker-Ramo Corporation, which instrument provides that only those securities approved by Respondent NASD could be shown by Bunker-Ramo as Operator on the NASDAQ system. Another provision of said Agreement plainly stated that Bunker-Ramo "shall not handle quotations over the NASDAQ system on any security unless approved by NASD." (Page 9)

Petitioners' Exhibit "1a", duly introduced (TR 97), is a form of application for NASDAQ service from a broker to the Respondent NASD, and provides that quotations will be entered into the NASDAQ system only on securities authorized by the NASD and that the NASDAQ system will be regulated and controlled by the NASD pursuant to its rules.

At trial Petitioners contended that these written documents, when used to serve the ends of a group boycott against inclusion of all listed securities of NASDAQ, simply because they were listed securities, in themselves constituted a contract and evidence of a conspiracy or combination in restraint of trade, and a *per se* violation from which no manner of explanation could excuse Respondents for their wrongful conduct.

On the first day of trial, Petitioners offered an August 12, 1970, Memorandum from the Division of Trading and Markets of the SEC to the Commission, with the subject being "Chronology of Events Leading to NASD Determination to Carry on NASDAQ Over-the-Counter Markets in Exchange Listed Securities". (P. Ex. 2) (TR. 106, et seq.) This Exhibit contained the remarkable information that NASD attorney, John Miller of Washington, D. C. (P. 8) had advised the SEC that "the association probably could not justify denying access to listed securities which otherwise met all the standards for inclusion in the system." (P. Ex. 2) Such document went on to show that Respondent NASD had retained Robert Bicks of the law firm of Breed, Abbott & Morgan, and the head of the Antitrust Division of the Department of Justice from 1958 to 1960, and that on his study of NASDAQ eligibility standards the SEC was advised that in counsel's opinion "the NASD could not legally justify exclusion of the over-the-counter markets in listed securities." (Pages 9 and 10) This Exhibit, as to all legal opinions, even though not involving confidential communications from a client to an attorney was ruled inadmissible. (TR. 108)

Testimony of witnesses in Court then included M. A. Schapiro, Judson Francis, Harry Reed, Myron Hauser, Lee Cheshier, Carl Abramson, Harvey Earp, being attorneys, brokers or customers of Shumate, and testifying also were the adverse attorney-witnesses, Robert Bicks, as to the interlocking control of the NYSE over the NASD, and Lloyd Derrickson, General Counsel of the NASD, as to the contrast between the written vote of the full membership of the NASD approving inclusion of listed securities on NASDAQ and the trumped-up, last-minute telephone meetings or polls of the Executive Committee and Board of Governors of the NASD taking listeds off NASDAQ just prior to start-up. Shumate individually testified at length (TR. 665-868).

Depositions of Saul, Haack, Macklin (President of the NASD), Teach (Chairman of the Board of the NASD and Vice President of Shearson, Hammill), Needham (now Chairman of the NYSE), and Paul Kolton (now President of the ASE) were read into evidence, along with answers of the NASD, NYSE, AMEX and Shearson, Hammill to interrogatories served by Petitioners.

The evidence presented concerning the continuing conspiracy to ignore or boycott listed securities on the NASDAQ system by exchange member firms *in toto* included that of Macklin, who when asked if he had observed any exchange firms using NASDAQ in the trading of listed securities, replied:

> "I can't recall any. There is a very small number of dealers, exchange members *or non-exchange members*, using NASDAQ to trade listed securities, a very small number." (Emphasis added)

Myron Hauser testified (TR. 370) that his member firm was ignoring NASDAQ insofar as trading in listed securities was concerned. He stated that his firm simply did not use the NASDAQ for listed stocks even though they were on the screen now (TR. 371).

Carl Abramson testified (TR. 626) that he had never seen a bid-or-asked quotation in a listed security made by an NYSE firm on the NASDAQ screen.

Harvey Earp testified (TR. 637) that his member firm requires him to place his execution in listed securities with the NYSE and he never is permitted to go to NASDAQ to purchase or sell a listed security. He said that it was correct that the NASDAQ system, as to listed securities, was being ignored at the exchange firm where he works.

Shumate testified (TR. 740, 741) that the NASDAQ markets in listed securities were being ignored and simply were not put on the screen in good faith. Moreover, he testified that he has the NASDAQ machine and is a market-maker himself, trading in securities and executing his own orders. He has seen that markets in listed securities are always shown by firms with over-the-counter symbols, and he has never seen a single exchange member firm with its name or symbol as having a market or interest in any listed security.

Article III, Section 1 of the NASD Manual-Rules of Fair Practice (P. Ex. 12 and 12a), such article being popularly termed the "best execution rule", provides as follows:

> "In any transaction for or with a customer, a member and persons associated with a member shall use reasonable diligence to ascertain the best inter-dealer market for the subject security and buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions. Failure to exercise such diligence shall constitute conduct inconsistent with just and equitable principles of trade in violation of Article 3, Section 1 of the Rules of Fair Practice."

Article III, Section 1 of the Rules of Fair Practice further provides:

> "In any transaction for or with a customer, no member or person associated with a member shall interject a third party between the member and the best available market except in cases where the member can demonstrate that to his knowledge at the time of the transaction the total cost or proceeds of the transaction, as confirmed to the member acting for or with the customer, was better than the prevailing inter-dealer market for the security. Failure to comply with the provisions of this paragraph shall constitute conduct inconsistent with just and equitable principles of trade in violation of Article III, Section I of the Rules of Fair Practice."

Rule 394 of the New York Stock Exchange, adopted in 1955 and amended in 1966 provides in part:

> "(A) Except as otherwise specifically exempted by the Exchange, members and member organizations must obtain the permission of the Exchange before effecting a transaction in a listed stock off the Exchange, either as principal or agent." (1955).

Rule 5 of the American Stock Exchange is of substantially the same import and effect.

Allusion to either of these Rules at trial was prohibited by the Court's ruling on Respondents' Motion in Limine sustaining exclusion of any mention or reference to these Rules in either testimony or documentation, and the subsequent instruction or admonition by the trial court to each witness to not make mention of the subject or effect of such Rules.

Shumate (718, 749, 769) testified that the initial exclusion of listeds from NASDAQ, and the subsequent boycott by NASD exchange-affiliated members of trading and listeds on NASDAQ, resulted in "a loss of trading volume in securities that we might otherwise have had, briefly stated."

Macklin, as President of Respondent NASD, testified:

> "The NASDAQ system was designed to make available quotations, particularly on securities where quotations were not highly visible. NASDAQ's *system was designed to make those quotations more visible* and as you say, hopefully, *induce more business or encourage more business.*" (TR. 401) (Emphasis added)

M. A. Schapiro, a New York broker-dealer with large positions in bank stocks, but not a member of either national exchange, stated it was "vitally" important to him whether or not listed securities were shown on NASDAQ.(TR. 200)

Shumate testified and estimated that his reasonable expectation of the benefits of a properly functioning, non-boycotted NASDAQ with listed securities thereon would be the production of at least $150,000.00 more business per year than he would otherwise have. (TR. 783) Petitioner Shumate then brought gross securities income down to net income, testifying that his costs of operation were historically 44% of gross. He then estimated that his damages for which he was entitled to recovery in this litigation would be $150,000.00 per year times twenty (20) or twenty-two (22) years, his life expectancy introduced into evidence by a stipulation, or about $3,000,000.00, less 44% in expenses or about one-half (½) thereof, leaving a rough estimate of the sum due him based on the reasonable predicates that he had put into evidence of approximately $1,500,000.00. (TR. 784) Tax returns for Petitioner Shumate & Company, Inc. for the years 1969, 1970, 1971 and 1972 were admitted into evidence. (TR. 826)

Shumate further testified that the initial exclusion, and subsequent boycott, of listed securities has affected his ability to attract salesmen, which in turn affects the volume of business his firm experiences. (TR. 730, 731, 739, 782, 783, 784, 854, 858) and that he has suffered specific losses, including a loss of annual fees in the amount of $25,000.00 (TR. 752 et seq.) and loss of orders placed by the New York State Teachers Retirement System (TR. 860, 865, 867), as a result of the boycott of listed securities on NASDAQ by exchange-affiliated NASD members.

On the afternoon of the 5th day of trial on the merits Petitioners rested their case in chief, and Respondents moved for a directed verdict. On the morning of the 6th day, the trial court granted said motions and dismissed the jury, finding sufficient proof to create a fact issue of a *conspiracy* to exclude listed securities at start-up as to all Respondents except Shearson, Hammill, but failing to find that Petitioner had suffered

any injury to his business by reason of such conspiracy. Then the Court ruled that there was no evidence that listed securities had been ignored by Respondents as part of any conspiracy once they had been included on the NASDAQ system, and again, ruled that in any event Petitioners had failed to show damages resulting to their businesses.

The judgment of the District Court dated December 6, 1973 is printed in Appendix "B" herein. The ruling of the District Court, as contained in the transcript of proceedings (TR. 1009-1012) is reproduced in Appendix "C" herein.

The Circuit Court affirmed the trial Court's decision, holding that "courts do not permit the facts of damage necessary to prove liability to be based on speculation," and that Petitioners had failed to establish the fact of damage.

The fundamental question which underlies this dispute may be stated simply: Can the New York Stock Exchange, the American Stock Exchange, and the National Association of Securities Dealers (by and through its President, Executive Committee, and Board of Governors) in concert, and by both overt acts and acquiescence, engage in a course of conduct intended first to foreclose the off-the-floor market of trade in listed securities, and subsequently intended to emasculate such market, and thereby deprive the investing public generally of an additional marketplace in securities while limiting the competition of non-exchange members, a course of conduct which is anticompetitive in effect and a *per se* violation of the Federal antitrust statutes, without injury presumptively resulting *ipso facto* thereby to non-exchange member broker-dealers and the public generally?

In order to determine this issue, the questions set out above involving construction of the Federal antitrust statutes, specifically the Clayton Act and the Sherman Antitrust Act, must be answered.

How a Federal Question Is Presented:

Petitioners' complaints were based upon § 1 of the Sherman Antitrust Act, and § 4 of the Clayton Act. All questions pertinent to review of the decision of the Court of Appeals involve interpretation of those provisions.

Interpretation of such provisions must be applied to conduct of certain securities exchanges regulated by the Securities Exchange Act of 1934, and conduct of an association organized and regulated under the Maloney Act.

These important questions of Federal law, as they relate to the practices here in question of interaction between the principals of the securities industry, affecting such a substantial and indispensable sphere of interstate commerce by means so suggestive of pernicious intent, have not been, but should be, decided by the Supreme Court.

REASONS FOR GRANTING THE WRIT

In *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S. Ct. 1246, this Honorable Court dealt "with the question of great importance to the public and financial community, of whether and to what extent the Federal antitrust laws apply to securities exchanges regulated by the Securities Exchange Act of 1934." In that case, the Court held that the New York Stock Exchange had violated the Sherman Act and was liable under the Clayton Act to corporate dealers in municipal bonds in the over-the-counter market for having withdrawn broker-dealers' private wire connections between broker-dealers and exchange members without notice or opportunity for hearing.

Reprehensible as the conduct of the New York Stock Exchange under the facts presented in *Silver* may have been, the pernicious nature, indeed the implication and effect, of such conduct is dwarfed when compared to that course of conduct followed by the New York Stock Exchange, the American Stock Exchange, and the National Association of Securities Dealers established by the undisputed facts of record in the instant case.

Each of the Respondents has been accorded certain powers of self-regulation as entities registered under, and generally governed by, the Securities Exchange Act of 1934 and/or its amendments, but while each often may assume a role in which it acts in a quasi-governmental capacity, Respondents nevertheless, by Congressional intent, remain essentially private free market forces. Yet the very nature of their respective self-regulatory functions serves to enhance, and on occasion unduly exaggerates the tremendous power and influence these bodies wield with respect not only to the financial community, but our economy as a whole. This impact is further enhanced by Respondents' close association with and communication with, the Securities and Exchange Commission; this close association has no doubt

been, for the most part, beneficial to our financial community and our economy, but has led to some degree of familiarity and informality between the Commission and the Respondents which might also be desirable but for the fact that hand-in-hand with the benefits of so cordial an association come certain clear dangers, one of which has been here realized.

Under the undisputed facts of this case, the Respondents together sought the exclusion of exchange-listed securities from NASDAQ at its inception, and sought the approval of the Commission for such action, without polling, consulting, or notifying their respective memberships, other potentially interested and/or affected parties, or the public at large, and by such means, in terms of both time and manner, so as to prevent the participation of their respective members individually, or other potentially interested and/or affected parties, or the general public in the decision-making processes effecting such exclusion. No hearing, or other opportunity for presentation of views other than those of Respondents themselves was had before either the Respondents respectively, or the Securities and Exchange Commission, before the by-laws providing for the inclusion of exchange-listed securities on the NASDAQ system, as resolved and enacted by the NASD membership as a whole two years previously, had been repealed by executive action, and Commission approval of such action sought and received.

Respondents have attempted to cloak their activities of October, 1970, and thereafter, in a light, indeed several kinds of light, attributed by Respondents to have a "public interest" cast. Respondents first deny that their actions were concerted, insisting that each of their actions was taken independently, and that the timing and equatability of those acts, including the imprudently similar phraseology of their respective initial letters to the Securities and Exchange Commission (as dated October 9, 13, and 22) are "purely coincidental" and, in any event, inconsequential.

Respondents further insisted that their actions are exempt from the Federal antitrust statutes under the provisions of the Securities Exchange Act of 1934, and its amendments. Respondents then insisted that even in the event that their acts do not bear such immunity, such actions are nevertheless "protected" by the so-called *Noerr-Pennington* doctrine [*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 375 U.S. 127, 81 S. Ct. 523; *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585] assuring free exercise of First Amendment rights. Respondents further urged that initial review of their actions rests with the Securities and Exchange Commission under the doctrine of primary jurisdiction, and finally urged that even if none of the above applied Petitioners still could not have suffered any injury as a result of their conduct.

The Trial Court ruled, correctly, that the acts complained of were not such to be subject to the primary jurisdiction of the Securities and Exchange Commission, especially in view of the fact that the Commission had ostensibly passed upon the validity of the initial object of such actions, being the exclusion of exchange-listed securities from NASDAQ at its inception. Cf. *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 298, 93 S. Ct. 573, 34 L.Ed.2d 525. The Trial Court also inferentially ruled, as this Court has held, that the claimed exercise of First Amendment rights is not immunized from regulation when the means by which they are exercised is an integral part of the conduct which violate valid statutes, such as the Federal antitrust statutes. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609, 30 L.Ed.2d 642. This Court has also held that agency approval of an act does not immunize the act from the Federal antitrust laws. *Otter Tail Power Company v. United States*, 410 U.S. 366, 93 S. Ct. 1022, 35 L.Ed.2d 359; *United States v. Radio Corporation of America*, 358 U.S. 334, 79 S. Ct. 457, 3 L.Ed.2d 354; *Hughes Tool Company v. Trans-World Airlines, Inc.*, 409 U.S. 363, 93 S. Ct. 647, 34 L.Ed.2d 577.

The similarity between *Silver*, supra, 83 S. Ct., and the instant case is remarkable. In neither instance were other interested parties afforded an opportunity to present their views before the decision has been made. In both cases, the actions in question repudiated an existing policy without even informing other interested parties or the public of such contemplated action. In both cases, the parties directly affected were non-exchange member broker-dealers who again were not apprised of the contemplated action, or the decision thereon, until after the fact. Indeed, in both it was the ability of the non-exchange member over-the-counter dealer's ability to communicate effectively, and thereby compete effectively, which was critically impaired by Respondents' conduct. As the Court stated in *Silver*, 83 S. Ct. 1246 at 1252:

> "Without the instantaneously available market information . . . an over-the-counter dealer is hampered substantially in his crucial endeavor to buy, whether it be for customers or on his own account, at the lowest quoted price and sell at the highest quoted price. Without membership in the network of simultaneous communication, the over-the-counter dealer loses a significant volume of trading with other members of the network which would come to him as a result of his easy accessibility. These important business advantages were taken away from Petitioners by the group action of the exchange and its members."

Here, however, it was not just one non-exchange member broker-dealer who was affected by the exclusion of listed securities from NASDAQ at inception, but all non-exchange member broker-dealers in the NASD who were trading in listed securities. Respondents contend that such exclusion was not intended to be permanent, but was intended solely for the purpose of "further study", and, that in any event, listed securities were excluded from NASDAQ for only a relatively short period of time. In making this contention, Respondents failed to note that even the NASD was proposing a much longer delay, and

"study", and indeed at the time in question was contending that there was no "final" decision that listed securities would be included in NASDAQ. Neither the NYSE or AMEX favored inclusion of listed securities in NASDAQ at all, at any time.

The underlying reason for the opposition of the NYSE and AMEX is apparent, as they have long feared, and today fear, off-the-floor competition in securities listed on their exchanges. However, NASDAQ itself posed, and still poses, a peculiar threat to the Exchanges' continued viability for two reasons: first, a rapid electronic display, indeed a continuous electronic display, of bid-and-ask quotations in listed securities traded over-the-counter would conceivably put the third-market on an equal footing with the respective exchange markets, the latter having long had a rapid display capability, and the second reason being that visual display of the bid-and-ask quotations for listed securities traded in the third-market would conclusively establish for the first time that a substantial number of NASD members were not even consulting third-market listings in executing orders for their customers, in violation of Article III, Section 1 of the NASD Rules of Fair Practice.

Why would the New York Stock Exchange and the American Stock Exchange be concerned that the NASDAQ system would reveal such violations?

Respondents, including the NASD, would be concerned because even a causal observer might soon note the virtual if not complete, absence of Exchange-member firms' participation in third-market trading. This circumstance, when taken together with the fact that exchange member firms do not even consult third-market listings for their customers, except perhaps upon request, is directly attributable to Rule 394 of the New York Stock Exchange, and Rule 5 of the American Stock Exchange. These Rules prohibit trade in listed securities "off the floor" except under unusual circumstances, and, as in the case of Rule

5, only after specific application for leave to make a trade off the floor has been made on the Exchange. On the other hand, the NASD manual requires NASD members to make the best possible trade after consulting all available markets, such requirement being known popularly as the "best execution rule".

Petitioners were prevented from introducing Rule 394 and Rule 5 into evidence, and were proscribed from introducing any evidence by testimony or otherwise relating to the effect of such Rules which would give any indication of the source of such effect. With this circumstance, it was practicably impossible for Petitioners to establish "conclusively" at trial that the AMEX and NYSE themselves, rather than their individual members, were imposing and enforcing the boycott, or similarly to establish that the NASD was acquiescing in, or colluding with the proponents of, a group boycott, in violation of its own Rules of Fair Practice.

Nevertheless, Petitioners do submit that they have presented sufficient evidence to raise the question that, in collusion with, or in deference to, the New York Stock Exchange and the American Stock Exchange, the NASD is willfully failing to enforce the "best execution rule" against NASD members who are also members of one or both of the two principal Exchanges.

Petitioners further submit that if, as asserted by NASD President Macklin in his October 22, 1970 letter to Chairman Budge, the NASD Board of Governors had been opposed to the inclusion of listed securities the NASDAQ system "from the outset", the principal basis for such opposition is clear in view of the fact that the NASD Board of Governors, and more so the NASD Executive Committee, has historically in representation been dominated by persons affiliated with one or both of the principal Exchanges.

This Court has developed a doctrine that certain business relationships are *per se* violations of the Sherman Act without

regard to the consideration of their reasonableness. *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 78 S. Ct. 514, 2 L.Ed.2d 545.

A classic example of a *per se* violation of §1 of the Sherman Act is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. Such concerted action is usually termed, and should be termed here, a "horizontal" restraint, and constitutes a *per se* violation of our antitrust laws. The *United States v. Topco Associates, Inc.*, 405 U.S. 596, 92 S. Ct. 1126, 31 L. Ed.2d 515; *White Motor Co. v. U.S.*, 372 U.S. 253, 83 S. Ct. 696, 9 L.Ed.2d 738; *Temken Roller Bearing Company v. United States*, 341 U.S. 593, 71 S. Ct. 971, 95 L.Ed. 1199.

In the present case, the Court is presented with a concerted refusal to deal by Exchange member firms in the third-market, such boycott being sponsored and maintained by the Respondent Exchanges, with the acquiescence of NASD officials whose impartiality is, at best, suspect. "Concerted refusals by traders to deal with other traders . . . have long been held to be in the forbidden category." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, at 212, 79 S. Ct. 705, at 709, 3 L.Ed.2d 741. What makes this conduct especially repugnant is the fact that non-exchange affiliated NASD members are often required to "go to the floor" of the Exchanges under the same "best execution rule".

In this regard, exclusion of any reference to Rule 394 or Rule 5 also precluded Petitioners from effectively presenting evidence concerning damages, with respect to commissions "lost" or "given up" by Petitioners in making trades on the floor of the Exchanges in listed issues which are also carried on the third-market, which would not have occurred but for the existence of such Rules and the failure of the NASD to enforce its own "best execution rule".

Petitioners' effectiveness in presenting the true damages involved was further, and even more significantly, inhibited by the Trial Court's ruling that these cases could not proceed as a class action. The Trial Court felt, and the Court of Appeals agreed, that "in this antitrust case the proof of injury to business or property of each class member is critical for the determination of Defendants' liability to any individual." This conclusion only emphasizes the basic misunderstanding of the case by the lower Courts. NASDAQ, conceived and intended to be an electronic central marketplace, was further intended to replace in their entirety the existing mechanisms of the over-the-counter market once fully operational and in active use. It was hoped and intended that *all* over-the-counter business would be conducted through and with NASDAQ. Thus, if listed securities were not carried on NASDAQ, there would be no third-market. It should be noted that the third-market has consisted of not only certain securities listed on either the American or New York Stock Exchange, but has further consisted of securities listed on one or more of the regional exchanges, and there is no evidence that any of the regional exchanges were consulted or advised with respect to the actions of the NYSE, AMEX and NASD until after the initial decision of NASDAQ, regional exchange-carried issues, otherwise eligible for NASDAQ, would be as "visible" as listings on the two principal Exchanges. And the greater the number of listed issues carried on NASDAQ (listed issues being invariably better known than most over-the-counter stocks) the greater the likelihood that the average investor in turn would perceive the viability of this electronic marketplace, and place greater confidence in the over-the-counter market. This is summed up in Petitioners' testimony that they suffered a "loss of trading volume in securities that we might otherwise have had, briefly stated." "We" refers not only to Petitioners, nor only to third-market broker-dealers, but to all non-exchange affiliated over-the-counter broker-dealers.

The fact of injury to all NASD members who were not affiliated with one or both of the principal Exchanges is ap-

parent, and predominates over any individual question as to extent of damages. Rule 23(b)(3). The class of such persons was easily identifiable, consisting of some 2,982 individuals or firms on the membership roster of the NASD, and, by the same token, could be easily notified of the proceedings at the addresses furnished in such roster. Further, in both respects, the conduct of the Respondents was such to indicate that ". . . the part[ies] opposing the class [have] acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . ." Rule 23(b)(2).

Class action treatment of these cases would have been particularly appropriate, and by far the superior means of adjudicating the controversy, especially as class action treatment would have facilitated bringing the double standard employed by the NASD vis-a-vis Exchange and non-Exchange members into focus. Nevertheless, class action status was denied, in error, for reason of its "lack" of "manageability."

In view of the nature and effect of Respondents' conduct, taken together with the limitations on both issues and evidence permitted to be presented at trial, Petitioners were confronted with, and for that matter any non-exchange affiliated NASD member would be confronted with, the unenviable task of proving what profits they could have realized from trading in listed securities on NASDAQ had the NASD enforced its own rules, "pure speculation," or with reciting "lost" commission figures without being able to relate them to the basis on which they were lost.

It has long been the opinion of this Court that antitrust damages are not rendered impermissible "because they cannot be calculated with absolute exactness." *Eastman Kodak v. Southern Photo Materials Co.*, 273 U.S. 359 at 379, 47 S. Ct. 400,

at 405; *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 51 S. Ct. 248.

In *Bigelow v. R.K.O. Radio Pictures*, 327 U.S. 251, 66 S. Ct. 574, 90 L.Ed.2d 652, this Court said:

> "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." 327 U.S. at 265, 66 S. Ct. at 580.

Here, Petitioner has shown a "concerted action of the [New York Stock Exchange, American Stock Exchange, and National Association of Securities Dealers which is] in simple terms, a group boycott" and selective, discriminatory enforcement of rules originally intended to be "just and adequate to insure fair dealings and to protect investors", only to be told that because he can link his damages only to his previous business experience, and "speculate" as to what he might have realized but for Respondents' conduct, he has failed to establish the existence of damages as a matter of law.

> "To deny the injured party the right to recover any actual damages . . ., because they are of a nature which cannot be thus certainly measured, would be to enable parties to profit by, and speculate upon their own wrongs, encourage violence and invite depredation. Such is not, and cannot be the law, though cases may be found where courts have laid down artivicial and arbitrary rules which have produced such a result." 22 Mich. 117 at 130, as cited by Justice Sutherland in *Story Parchment Co. v. Patterson Parchment Paper Co.*, 51 S. Ct. 248 at 251 together with the numerous other cases cited therein.

That Petitioners, along with other NASD members who are not members of the Exchanges, have suffered damages, and are continuing to suffer damages, as a result of the emasculation of the NASDAQ system, cannot be disputed.

Of much greater significance, however, is the fact that neither Petitioners nor fellow NASD members were furnished notice that Respondents were contemplating taking action to secure the exclusion of listed securities from NASDAQ, or notice that the Respondents were taking such actions, or otherwise afforded an opportunity to make their views known concerning the proposed repeal of NASD by-laws enacted two years previously by the entire membership of the NASD, until such repeal had been authorized and effected by the NASD Executive Committee and Board of Governors, and only thereafter being furnished with the reasons for such repeal, reasons which thereafter proved themselves insubstantial.

Since October of 1970 to the present, no procedural safeguards to prevent a recurrence of this kind of conduct have been effected.

In *Silver*, supra, 83 S. Ct. 1246 at 1259, this Court stated that:

> "The aims of the statutory scheme of self-policing, to protect investors and promote fair dealing are defeated when an exchange exercises its tremendous economic power without explaining its basis for acting, for the absence of an obligation to give some form of notice and, if timely requested, a hearing creates a great danger of perpetration of injury that will damage public confidence in the exchanges."

The Court found that procedural safeguards must be established and said "the benefits which a guarantee of procedural safeguards brings about are, moreover, of particular importance here. It requires by little appreciation of the extent of the Exchanges' economic power and of what happened in this country during the 1920's and 1930's to realize how essential it is that the highest ethical standards prevail as to every aspect of the Exchanges' activities". Id. 83 S. Ct. at 1262.

Can the standard of conduct required of the three primary market forces in this country—the American Stock Exchange,

the New York Stock Exchange, and the National Association of Securities Dealers—when acting in unison, be less demanding?

If Respondents' actions were taken out of self-interest, as Petitioners submit has been established here, such conduct would, and does, fall within one of the "classes of restraints which from their 'nature or character' [are] unduly restrictive, and hence forbidden by both the common law and the statute. * * *

As to these classes of restraints * * * Congress [has] determined its own criteria of public harm and it [is] not for the courts to decide whether in an individual case injury [has] actually occurred." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, supra, 359 U.S. at 211, 79 S.Ct. at 709.

While it has been held that it is not enough for a plaintiff to show he suffers injuries simply as a member of the general public [*Wolfe v. National Lead Co.*, 15 F.R.D. 61 (N.D.Cal. 1953), aff'd. 255 F.2d 427 (9th Cir.), cert. denied, 350 U.S. 915, 76 S.Ct. 198 (1955)], where the plaintiff is in the sector of the economy in which the violation threatens a breakdown of competitive conditions [*Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51, 54-55 (9th Cir. 1951), cert. denied 342 U.S. 919, 72 S.Ct. 367 (1952)], the fact of injury should be presumed, especially in the consideration of a motion for directed verdict.

And while the area of commerce affected by Respondents' conduct is itself most substantial, there being 8.4 million shares traded in the third market for the week ended June 27, 1975 [*The Wall Street Journal*, Monday, June 30, 1975, page 20], the marketplace ultimately threatened by the means by which Respondents sought, and still seek, to effect their intent is that of the "free trade in ideas—that the best test of truth is the

power of the thought to get itself accepted in the competition of the market." Justice Oliver Wendell Holmes, dissenting in *Abrams v. United States*, 250 U.S. 616 at 630, 40 S.Ct. 17.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinions of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted

B. THOMAS McELROY
2505 Republic National Bank Tower
Dallas, Texas 75201
(214) 748-0961
Attorney for Petitioners

Of Counsel

WHITE, McELROY, WHITE, SIDES
& RECTOR
PEVERIL O. SETTLE, III
2505 Republic National Bank Tower
Dallas, Texas 75201

Certificate of Service

It is hereby certified that service of the foregoing Petition for a Writ of Certiorari to the Supreme Court of the United States has been made on the several parties thereto as follows:

1. On Respondent National Association of Securities Dealers by mailing three (3) copies in duly addressed envelopes with

air mail postage prepaid, to its attorneys of record as follows: Mr. Morris Harrell, 4200 Republic National Bank Tower, Dallas, Texas 75201.

2. On Respondent New York Stock Exchange by mailing three (3) copies in duly addressed envelopes with air mail postage prepaid, to its attorneys of record as follows: Mr. Fletcher Yarbrough, 3001 Main Place, Dallas, Texas 75250.

3. On Respondent American Stock Exchange by mailing three (3) copies in duly addressed envelopes with air mail postage prepaid, on its attorneys of record as follows: Mr. W. Randolph Elliott, 1000 LTV Tower, Dallas, Texas 75201.

It is further certified that all parties required to be served have been served, by the means aforesaid this .... day of July, 1975.

B. Thomas McElroy

APPENDIX

APPENDIX A

SHUMATE & COMPANY, INC., et al.,
Plaintiffs-Appellants,

v.

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., et al., Defendants-Appellees.

SHUMATE & COMPANY, INC., et al.,
Plaintiffs-Appellants,

v.

AMERICAN STOCK EXCHANGE, et al.,
Defendants-Appellees.

Nos. 74-1426, 74-1427.

United States Court of Appeals, Fifth Circuit

Opinion

(March 5, 1975.)

Appeals from the United States District Court for the Northern District of Texas.

Before TUTTLE, RONEY and GEE, Circuit Judges.

RONEY, Circuit Judge:

Gaston A. Shumate and his solely owned company Shumate & Company, Inc. (Shumate) filed two suits alleging violations of the Sherman Act on the part of the National Association of Security Dealers (NASD) and Shearson, Hammill & Company, Inc., in one suit, and the New York Stock Exchange (NYSE), American Stock Exchange (AMEX) and various named indi-

vidual defendants in the other. Shumate alleged that all the defendants were parties to two conspiracies in restraint of trade: first, a conspiracy to exclude securities listed on the major stock exchanges from the NASD Automated Quotation System (NASDAQ) at its beginning, and second, a conspiracy to ignore such securities after they were included on NASDAQ. The two suits were consolidated for trial, and after plaintiff had rested his case following five days of trial to a jury, the district court directed a verdict against him in favor of all defendants. As to the first alleged conspiracy, the district court found no evidence of damage to plaintiff. As to the second alleged conspiracy, the district court found no evidence of the conspiracy itself, and no evidence of injury from the conspiracy. As a matter of law, injury to a plaintiff's business or property is a necessary element of a private claim for any relief under the antitrust laws. Without sufficient evidence to present a jury question as to such injury, the court entered judgment against Shumate, from which Shumate appeals. We affirm.

FACTS

Shumate, a member of NASD but not a member of any major stock exchange, is a broker-dealer in securities, effectuating the purchases and sales for his clients in the over-the-counter market (OTC). The OTC market, unlike a stock exchange, has no central location in which transactions take place. The trades in OTC securities take place between individual brokers, generally over the telephone. Generally, the stocks traded in OTC are not listed on any stock exchange, and as such are referred to in the trade as "unlisted stocks." One segment of the OTC market consists, however, of trades, outside of the exchanges, of stocks which are listed on an exchange. This is commonly called the "third market." It is in reference to this third market in listed securities that Shumate has alleged antitrust violations on the part of the various defendants.

In response to a requirement by a 1964 amendment to the Securities Exchange Act of 1934 that NASD provide rules for dissemination of quotations on securities sold otherwise than on national securities exchanges, NASD employed Arthur D. Little, Inc., in 1967, to examine the feasibility of nationwide automated quotation system for OTC trading. The next year NASD hired Bunker-Ramo Corp. to construct the system which was named the National Association of Securities Dealers Automated Quotations System (NASDAQ). The full membership of NASD approved an amendment to NASD's by-laws authorizing the Board of Governors, within limitations, to adopt, amend, alter, or supplement the rules governing the NASDAQ system. This amendment of the by-laws was filed with the Securities Exchange Commission, as required by law. After consultation with the SEC, from which NASD concluded that the SEC wanted the third market included in NASDAQ, NASD adopted rules for the system which would make third market quotations for listed stocks eligible for NASDAQ.

During a visit with Gordon Macklin, President of NASD, in August 1970, Ralph Saul, President of the American Stock Exchange (AMEX), expressed his opposition to the plan to include listed stocks on NASDAQ. Macklin told Saul that NASD's NASDAQ Committee felt that listed securities should not be included, but that the SEC wanted them in the system, so they had been included. After Macklin refused Saul's offer to approach the SEC jointly, Saul visited the SEC where he expressed his dissatisfaction to Hamer Budge, Chairman of the SEC. Chairman Budge suggested that Saul place his objections in writing, which was done in a letter to the SEC dated October 9, 1970. Saul's basic concern was the possible adverse impact of such inclusion upon the stock exchanges and the public. Saul did not discuss his letter with anyone connected with NASD or NYSE either before or after writing it.

Robert Haack, President of the New York Stock Exchange (NYSE), also wrote a letter to the SEC in October of 1970,

expressing his concern over the possible ramifications of the inclusion of the third market in NASDAQ. While Haack sent a copy of his letter to Macklin, he did not send one to Saul. He had never seen a copy of Saul's letter to Chairman Budge.

A week after Haack sent his letter to the SEC, Macklin visited Chairman Budge to discuss the question of whether or not the SEC would approve a start-up of NASDAQ without the listed stocks. Chairman Budge again requested a letter, but two days later called Macklin to notify him that the SEC would approve the system without the third market at start-up. Following that call, the NASD Executive Committee and the NASD Board of Governors voted to start NASDAQ with only OTC stocks.

NASDAQ began operation on February 8, 1971, with quotations for only nonlisted OTC securities. Eight weeks later, NASD began a test period with the inclusion of 32 listed stocks, each having at least two interested market makers in the third market. The test securities included two for which Shumate had requested listing. After expiration of the test period, NASD, with SEC approval, made all listed stocks eligible for inclusion on NASDAQ. Any such security is included when, as with an unlisted security, the requisite number of market makers have properly requested its inclusion. Thus, it is the interest of individual market makers in the security which determines whether or not that security will be listed on NASDAQ. None of the defendants have any control over that interest.

SHUMATE'S APPEAL

On this appeal Shumate has argued that the district court erred in directing a verdict against him on the two alleged antitrust violations. The first violation was a combination or conspiracy to exclude listed stocks from NASDAQ at the time the system commenced operation. The results of this conspiracy

could only last the eight weeks between start-up of the system and the inclusion of the quotations on the system. The second was a conspiracy to ignore the listed securities once they had in fact become eligible for listing on NASDAQ and listed. To succeed in his lawsuit, Shumate must show injury from defendant's activities. The burden of Shumate's appeal is to show that there is sufficient evidence of injury in the record to present a jury question.

SHEARSON, HAMMILL & COMPANY, INC.

[1, 2] The district court found no evidence to associate Shearson, Hammill & Company, Inc. with the alleged conspiracy. The only connection Shearson, Hammill had with the activities from which these suits arose was that one of its officers, Gordon L. Teach, an individual defendant here, was Chairman of the Board of Governors of NASD during the period involved. His actions were taken as Chairman of NASD and not as an officer of Shearson, Hammill. In order for Shearson, Hammill to be liable for Teach's actions, it would have been necessary for him, in furtherance of the alleged conspiracy, to have been acting within the scope of his authority as a Shearson, Hammill officer. *See* Household Goods Carriers' Bureau v. Terrell, 417 F.2d 47, 54 (5 Cir. 1969), modified, 452 F.2d 152 (5 Cir. 1971) (en banc), appeal after remand, 494 F.2d 16 (5th Cir. 1974); United States v. Hilton Hotel Corp., 467 F.2d 1000, 1004-1007 (9th Cir. 1972), cert. denied, 409 U.S. 1125, 93 S.Ct. 938, 35 L.Ed.2d 256 (1973). Shumate offered no credible evidence from which the jury could have imputed Teach's activities to Shearson, Hammill, and the district court was correct in directing a verdict against Shumate as to Shearson, Hammill, and in rejecting Shumate's factually unsupported *respondeat superior* argument to hold Shearson, Hammill liable for any of Teach's acts.

LAW

[3] Except as to Shearson, Hammill, the district court concluded that there was enough evidence presented by Shumate at the trial to make a jury question as to the existence of a conspiracy to exclude the listed securities. Assuming there to be a violation of the antitrust laws, however, the plaintiff concededly must show that he has been injured in his business or property as a prerequisite to a private suit:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

15 U.S.C.A. § 15; *see* Hobart Brothers Co. v. Malcolm T. Gilliand, Inc., 471 F.2d 894, 901 (5th Cir.), cert. denied, 412 U.S. 923, 93 S.Ct. 2736, 37 L.Ed.2d 150 (1973); Gorham & Johnson, Inc. v. Chrysler Corp., 308 F.2d 462, 469 (5th Cir. 1962), cert. denied, 372 U.S. 912, 83 S.Ct. 725, 9 L.Ed.2d 719 (1963). The focus of the appeal from the district court's refusal to submit the claim based on the first alleged conspiracy to the jury therefore turns on whether the district court was correct in deciding that there was no issue of fact as to the plaintiff's claim of injury in his business or property.

As to the second alleged conspiracy, the ignoring of the third market once listed security quotations were allowed on NASDAQ, the district court found a lack of proof as to the conspiracy itself. Partly in response to this situation, Shumate has shifted his argument on appeal, asserting now that there was only one continuing conspiracy and therefore, the

sufficiency of the evidence found by the trial court to make a jury question as to the first alleged conspiracy is *ipso facto* sufficient to produce a jury issue as to the second alleged conspiracy. We need not consider the propriety of this shift in theories from the trial court to the appellate court. *Cf.* Virtue v. Creamery Package Manufacturing Co., 227 U.S. 8, 38-39, 33 S.Ct. 202, 57 L.Ed. 393 (1913); Lamb Enterprises, Inc. v. Toledo Blade Co., 461 F.2d 506, 515-516 (6th Cir.), cert. denied, 409 U.S. 1001, 93 S.Ct. 325, 34 L.Ed.2d 262 (1972). Whatever the nature of the alleged conspiracy, whether two separate ones or one single one, injury is the *sine qua non* for stating a cause of action. Since the district court found a lack of sufficient proof of injury from the second conspiracy as well as a lack of proof of the conspiracy itself, we affirm the district court's decision that the plaintiff failed to present a jury question as to any antitrust claim. Thus, we need not review the decision that there was insufficient evidence to present to the jury as to whether there was a conspiracy in violation of the antitrust laws.

[4] In evaluating the district court's directed verdict, we must keep in mind the dictates of Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969), in light of the charitable view we have taken in treble-damage cases and the difficulties of proof facing a plaintiff who must try to prove what would have accrued to him in the absence of the defendant's anticompetitive practice. Lehrman v. Gulf Oil Corp., 464 F.2d 26, 46 (5th Cir.), cert. denied, 409 U.S. 1077, 93 S.Ct. 687, 34 L.Ed.2d 665 (1972), appeal after remand, 500 F.2d 659 (5th Cir. 1974). Nonetheless, although we are generally lenient as to evidence required to show the amount of damages in antitrust matters once liability is determined, courts do not permit the fact of damage necessary to prove liability to be based on speculation. Household Goods Carriers' Bureau v. Terrell, 452 F.2d 152, 159 (5 Cir. 1971) (en banc), appeal after remand, 494 F.2d 16 (5th Cir. 1974).

INJURY FROM FIRST CONSPIRACY

[5] Shumate alleged basically four types of injury: a trading volume increase less than he had anticipated under NASDAQ, lower annual profits because of his inability to attract new salespersons, the loss of commissions on some orders placed in April and May of 1972 by a retirement fund, and the loss in August 1973 of a discretionary account for which he was paid an annual fee. None of these elements of injury is related to the ineligibility of listed stocks for the period where such stocks were not generally eligible, February 8, 1971, until October 18, 1971. Shumate did seek to have two listed securities placed on NASDAQ in the spring of 1971, in order to become a market maker in them, and they were included during the test period. But once they were listed, nothing indicates that Shumate attempted to make a market in them using NASDAQ. In fact, Shumate could not have used NASDAQ to become a market maker in those securities as he did not have a NASDAQ terminal in his office until early 1973. It is clear that Shumate presented nothing in the record, not even his own unsupported conclusions, to demonstrate any injury during the period that listed securities were excluded pursuant to the alleged conspiracy. In such a situation with *no* evidence of injury presented, the district court was undoubtedly correct in directing a verdict against Shumate on the first count.

INJURY FROM SECOND CONSPIRACY

The district court also held there to be a lack of evidence sufficient for jury consideration of injury from the alleged conspiracy to ignore the third market listed on NASDAQ. The trial court viewed the evidence as showing only that stockbrokers in individual members of the stock exchanges, as individuals, ignored listed securities on NASDAQ, with no evidence

to link their conduct to any conspiracy among the named defendants. *Cf.* Northern California Pharmaceutical Association v. United States, 306 F.2d 379, 388-391 (9th Cir.), cert. denied, 371 U.S. 862, 83 S.Ct. 119, 9 L.Ed.2d 99 (1962). But we need not consider the existence or nonexistence of any conspiracy between the defendants. A thorough review of the record on appeal has convinced us that the district court correctly determined that there was no evidence from which reasonable and fairminded persons could have found that any injury to Shumate resulted from the alleged practice.

[6, 7] The only evidence Shumate presented regarding his damages at trial was his own testimony, unsupported by any relevant data. Shumate, among other things, asserted to the trial court and to this Court on appeal that so much money and effort was expended to create NASDAQ that it is obvious that it was intended to increase trading volume, and consequently profits, of the individual members of NASD. Since he has not experienced this anticipated increase in profits, he asserts, he has obviously been damaged. With only his *ipse dixit* to establish the fact of damage, Shumate would have this Court find his testimonial speculation and contentions supply the basis for a jury issue as to the fact of damage. But more evidence than this is necessary to demonstrate that there has been injury before the jury can be allowed to consider the amount that would properly compensate him for such injury.

> "Both the fact of damage, or causation, and the amount of damage are questions of sufficiency of the evidence, though the certainty of proof required on each issue differs. As the Supreme Court said in Story Parchment Co. v. Paterson Parchment Paper Co., 1931, 282 U.S. 555, 562, 51 S.Ct. 248, 250, 75 L.Ed. 544, 548,
>
> > [T]here is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof

> necessary to enable the jury to fix the amount. The rule which precludes recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."

Terrell v. Household Goods Carriers' Bureau, 494 F.2d at 20 (footnote omitted); *accord*, Hobart Brothers Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894, 902-904 (5th Cir.), cert. denied, 412 U.S. 923, 93 S.Ct. 2736, 37 L.Ed.2d 150 (1973). Shumate could not recover any amount of damage, where the jury could only speculate either as to its occurrence or as to its causal relationship to the anticompetitive activity. *See, e. g.*, Dailey v. Quality School Plan, Inc., 380 F.2d 484, 487-488 (5 Cir. 1967), appeal after remand, 427 F.2d 1080 (5th Cir. 1970). It is incumbent upon plaintiff to produce some credible evidence to support his various allegations of injury and its cause. Failure to do so makes a directed verdict correct. *See, e. g.*, Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 66 S.Ct. 574, 90 L. Ed. 1040 (1946); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931); Hobart Brothers Co. v. Malcolm T. Gilliland, Inc., *supra*.

We have examined the record for evidentiary support as to each of the four types of injury asserted by Shumate. *First* Shumate alleged he experienced a lesser increase in trading volume than he had antcipated from NASDAQ. He presented no evidence to show that this lesser increase was related to the alleged conspiracy, which only affected the third market segment of the OTC. He did not present any records of his own trades in the third market before or after NASDAQ became operational, or any projections of what he had expected from NASDAQ regarding the third market. Shumate produced some gross income figures which he did not even relate to the area in which the alleged conspiracy would have its effect, the third market.

His general allegation of lesser increase in trading volume in the relevant market is simply not supported by any evidence.

Second, Shumate argues that he had lower annual profits due to his inability to hire additional salespersons. This argument, unsupported by relevant data, finds its sole support in his bare assertion that after NASDAQ was operational, but while the third market was being ignored, he was unable to hire any new salespersons. There was no testimony from any of the prospective salespersons that they chose not to work for Shumate because of the failure of the third market to develop more fully with the commencement of NASDAQ. Shumate's after-the-fact therefore-because-of-it argument is especially weak considering the fact, adduced during his own testimony, that he had experienced much difficulty in finding associates well before NASDAQ's operation. Without some evidence that he could have employed additional salespersons if the third market had developed more expansively under NASDAQ, it is not necessary to consider whether Shumate's proof of the beneficial result of additional salespersons as sufficient to create a jury issue.

Third, plaintiff alleges the conspiracy made him lose the commissions on a number of individual transactions for the New York State Teachers' Retirement System. Two things are particularly relevant to this item of alleged injury: first, at the time these orders were placed, listed securities were eligible to be displayed on NASDAQ, but any particular security would be included only if more than one NASDAQ subscriber (a broker-dealer) were interested in dealing in the security in the third market, and second, Shumate did not subscribe to NASDAQ when the orders were placed. Thus, when the orders were placed Shumate did not attempt to execute them with the aid of NASDAQ and could not testify positively that had he attempted to do so, he would have been unsuccessful. Perhaps his failure to subscribe also contributed to his failure to present evidence that the securities for which the orders were placed were even

on the NASDAQ system. Without proof that the securities were listed on NASDAQ, there could certainly be no reasonable inference drawn that they were being ignored. Shumate's argument boils down to this: had NASDAQ been fully competitive, he would have subscribed to it, and if he had subscribed to it and if the securities were listed he would have been able to execute the transactions in a manner otherwise unavailable to him. A jury could not reasonably draw the inferences necessary to reach this conclusion from the bare allegations in Shumate's testimony, devoid of supporting facts.

Last, Shumate alleged injury from his loss of an account which paid him a $25,000 annual fee in August of 1973, almost two years after listed securities were eligible for inclusion in NASDAQ. Other than Shumate's unsupported assertion that one of the proximate reasons for losing the account was the failure of NASDAQ to develop as he had thought it would, there is no evidence of the reason for the loss of the account. Shumate produced no data relating to transactions which he had attempted to make for the account, but as to which he had been frustrated by the alleged conspiracy. He did not produce any correspondence or testimony from the account client supporting Shumate's bare allegation that the failure of the third markest to develop under NASDAQ had caused the withdrawal of the account from Shumate's business. Shumate did not even offer the details of the operation of the account, from which a jury might have understood the reasoning from which his own conclusion was derived. In this instance, as in the other areas of alleged injury. Shumate simply failed to produce any relevant data from which the jury could find any damage.

MISCELLANEOUS POINTS ON APPEAL

Shumate appeals other rulings of the district court, which, if error, might bear upon the correctness of the court's decision as to whether there were sufficient issues of fact for presentation to the jury.

1. *Class Action*

[8, 9] Shumate asserts that, regardless of the merits of his own claim, the district court should have allowed him to maintain the suits as class action representative for some 3000 members of NASD who are not members of NYSE or AMEX. The district court denied Shumate class action status because of its conclusion that, even if a conspiracy were proved, the controlling question as to liability was whether a class member had suffered injury. It opined that the difficulties likely to be encountered in maintaining the cases as class actions outweighed the benefits. The district court's decision is reviewable only for an abuse of discretion. *See* Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1123 (5th Cir. 1969). We find no abuse of discretion. This case is different from one where liability can be shown as to all class members, with only the amount of damage to be determined as to each. In this antitrust case the proof of injury to business or property of each class member is critical for the determination of defendants' liability to any individual. The district court was within its discretion in deciding that common questions of fact do not predominate. *See* F.R.Civ.P. 23(b)(3); Smith v. Denny's Restaurants, Inc., 62 F.R.D. 459 (N.D. Cal. 1974); Kinzler v. New York Stock Exchange, 62 F.R.D. 196 (S.D. N.Y. 1974); Gneiting v. Taggares, 62 F.R.D. 405 (D. Idaho 1973).

2. *Elimination of Collateral Claims*

[10, 11] Shumate also attacked the district court's refusal to allow plaintiff to interject into these cases the issues related to the stock exchanges antirebate rules, and the court's refusal to consolidate with these cases another case which plaintiff has pending on that issue. Again our review is limited to a determination of whether the district court abused its discretion on these matters. Considering that another suit in which Shumate was an active member of the plaintiff class had already been tried on these issues and was *sub judice* in the District Court for the Eastern District of Wisconsin, *see* Thill Securities Corp. v. New York Stock Exchange, 433 F. 2d 264 (7th Cir. 1970), cert. denied 401 U.S. 994, 91 S.Ct. 1232, 28 L.Ed.2d 532 (1971), that Shumate and his counsel independently admitted prior to trial that the issue in plaintiff's nonconsolidated suit was separate from the issues in these suits, and further, that there were numerous defendants in the nonconsolidated suit who are not parties to these suits, we see no abuse of discretion in the district court's decision to have plaintiff pursue the two claims separately.

3. *Evidentiary Rulings*

[12] The district court did not err either in its evidentiary rulings on two voluminous exhibits offered by plaintiff or in its refusal to allow Shumate to introduce into evidence an SEC staff memorandum which alluded to legal opinions on the illegality of NASDAQ without listed securities. One of these exhibits was a bound volume containing all memoranda, letters and documents regarding the implementation of NASDAQ by NASD contained in SEC files. The other was a volume of several hundred pages of similar material from NASD's own files. The two large exhibits were first presented to the district court at the end of a trial day. Defense counsel reserved the right to object for irrelevance to any of the individual documents which com-

prised the exhibits. The district court agreed to allow defense counsel to examine the exhibits overnight and to offer their objections the next morning. The next morning the court directed plaintiff's counsel to number each document and to offer each separately so that the court could rule on the admissibility of each separately. Nonetheless, Shumate failed to offer any documents in his case-in-chief. It was only after the court had ruled on defendants' directed verdict motions that plaintiff offered some of the individual documents into evidence, and even then plaintiff did not specifically identify which documents he was offering. The district court sustained defendants' objections. The particular documents plaintiff offered were merely general statements relating to the effect of NASDAQ on the third market and the desire of some NASD members to include more listed stocks. It was not demonstrated that they would have been admissible. *See* Standard Oil Co. of California v. Moore, 251 F.2d 188, 212-218 (9th Cir. 1957), cert. denied, 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148 (1958). Even had they been otherwise admissible, they did not relate to plaintiff's own situation and provided no facts to bolster plaintiff's inadequate proof of his own injury. Under such circumstance, we can find no abuse of the trial court's discretion.

[13-15] Similarly, we sustain the district court's refusal to admit the portions of an SEC study referring to various legal opinions as to the illegality of NASDAQ under the antitrust laws if the listed securities were excluded. Those opinions were in no way related to alleged conspiracy between the defendants to these suits. The memorandum containing these opinions does not quote the NASD attorneys verbatim, but merely states the SEC's interpretation of discussions with NASD attorneys while the SEC and NASD were finalizing the terms of the NASDAQ system's approval by the SEC. Shumate argues that since the opinions expressed a belief that a possible violation of the antitrust laws could result from the operation of NASDAQ without the listed securities, and since a private antitrust violation re-

quires injury, the opinions implicitly found injury from such action and are probative of the fact of damage. We agree with the district court that the memorandum references to the opinions were inadmissible. First, the opinions were clearly hearsay as to all defendants and without Shumate demonstrating that the defendants had vouched for their accuracy, the legal opinions would not have been admissible as an admission of a party opponent exception to the hearsay rule. See Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679, 686 (8th Cir. 1966); Standard Oil Co. of California v. Moore, 251 F.2d 188, 218 (9th Cir. 1957), cert. denied, 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148 (1958). Second, while in some circumstances opinions offered to a Government agency might be admissible not for the truth of the matter stated therein, but to show purpose and character of certain acts alleged to constitute an antitrust violation, see Lamb Enterprises, Inc. v. Toledo Blade Co., 461 F.2d 506, 515-516 (6th Cir.), cert. denied, 409 U.S. 1001, 93 S.Ct. 325, 34 L.Ed.2d 262 (1972), here the opinions could not have served even that purpose because they related to an antitrust violation by the members of NASD as a group, and not the alleged violation of NASD as an entity in conspiracy with the other defendants in this suit. *Cf.* Northern California Pharmaceutical Association v. United States, 306 F. 2d 379. 388-391 (9th Cir.), cert. denied, 371 U.S. 862, 83 S.Ct. 119, 9 L.Ed.2d 99 (1962). Third, even if the opinions had been admissible to show the conspiracy, they would not have affected the directed verdict against Shumate which was based on his failure to produce evidence of any injury. The opinions expressed to the SEC, a Government agency, did not state that the possible violation of the antitrust laws would give rise to a private claim and therefore, did not address the possibility of injury. Even if they could be viewed as intimating the possible existence of a private claim, there is nothing to show that any possible injury was to Shumate's business, which is the only injury for which Shumate could recover. In addition, it is not appropriate to admit a legal opinion as to a fact which is within

the competency of the jury itself to determine from evidence presented, and not requiring special expertise. *See* McCormick on Evidence, § 13 (2d ed. 1972).

[16] The trial court did not abuse its discretion in denying Shumate leave to file an amended complaint or in taxing costs against plaintiff. The need for the amended complaint was obviated by the filing of the second suit and its consolidation for trial with the first suit. The amended complaint, even if allowed, would not have affected the fate of Shumate's claims. The particulars of the costs so taxed are not here considered, as the record indicates that the district court has not ruled thereon.

Affirmed.

APPENDIX B-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SHUMATE & COMPANY, INC., et al.,
Plaintiffs,

v.

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., et al.,
Defendants.

CIVIL ACTION.
No. CA-3-4361-D.

Judgment

(Filed Dec. 6, 1973)

On October 29, 1973, this action came on for trial before the court, Honorable Robert M. Hill, United States District Judge, a jury having been impaneled and the cause proceeded to trial. The court and the jury received and heard the evidence offered by plaintiffs, and after plaintiffs rested each defendant presented to this court a motion for a directed verdict. The court having considered the motions, the evidence and the argument of counsel is of the opinion that the motions for directed verdict should be sustained for the reasons stated by this court in the trial record. *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969).

It is therefore ORDERED that Shumate & Company, Inc., and Gaston A. Shumate, plaintiffs, recover nothing of or from the defendants, that all relief sought by plaintiffs in this cause

be denied, and that this action is hereby dismissed in its entirety on the merits.

It is further ORDERED that defendants recover from plaintiffs their costs of action.

Dated this 6th day of December, 1973.

/s/ B. Wm. Hill
United States District Judge

APPENDIX B-2

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk

March 31, 1975

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130

TO ALL PARTIES LISTED BELOW:

No. 74-1426—Shumate & Co., Inc., et al. v. National Assoc. of Securities Dealers, Inc., et al.

74-1427—Shumate & Co., Inc., et al. v. American Stock Exchange, et al.

Gentlemen:

The enclosed order has this day been entered on petition( ) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours

EDWARD W. WADSWORTH
Clerk
/s/ By CLARE F. SACHS
Deputy Clerk

/mbj

cc: Mr. B. Thomas McElroy

Messrs. Morris Harrell
Lyman Hughes

Mr. Fletcher Yarbrough

Messrs. Randolph Elliott
William H. Tinsley

Mr. Robert A. Bicks

Mr. Briscoe R. Smith

Mr. Robert B. Fiske, Jr.

APPENDIX B-3

In the United States Court of Appeals
for the Fifth Circuit

Nos. 74-1426, 74-1427

SHUMATE & COMPANY, INC., et al.,
Plaintiffs-Appellants,

v.

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., et al., Defendants-Appellees.

SHUMATE & COMPANY, INC., et al.,
Plaintiffs-Appellants,

v.

AMERICAN STOCK EXCHANGE, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Texas

On Petition for Rehearing

(March 31, 1975)

Before TUTTLE, RONEY and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered causes be and the same is hereby DENIED.

APPENDIX C

Portion of Transcript of Proceedings Containing District Court's Ruling on Motion for Directed Verdict

[1009] The Court: Now, as to this case, the case that is now on trial in this court, CA 3-4361 and CA 3-4708, Shumate & Company, Incorporated and Gaston A. Schumate, Individually, versus the National Association of Securities Dealers and Shearson, Hammill & Company, New York Stock Exchange and the American Stock Exchange—

I have considered the motions for directed verdict that have been filed by the Defendants in this case, and I have read a great deal of the testimony, which has been furnished me; I have read the briefs of the parties—their trial briefs they prepared in connection with the motion for the instructed verdict, and this is the Court's finding in connection with the Defendants' motions.

RULINGS ON DEFENDANTS' MOTIONS
FOR DIRECTED VERDICT

On Count I of CA 3-4361, and also the Count **[1010]** I of CA 3-4708, which includes allegations with reference to a conspiracy to exclude listed securities from the NASDAQ system on start-up; and

Then by supplemental complaint, it includes a conspiracy to ignore listed securities on NASDAQ.

As to the conspiracy to exclude listed securities, the Court is of the opinion:

That there may be evidence upon which reasonable minds could differ as to the existence of a conspiracy between AMEX,

New York Stock Exchange and the National Association of Securities Dealers, but not as to Shearson, Hammill, to exclude listed securities from NASDAQ system at the start-up.

However, proof of injury to the business or property of the Plaintiffs is a prerequisite for recovery under the Antitrust laws.

The Court is of the opinion there is an absence of evidence that the Plaintiff, either the corporation plaintiff or the plaintiff individually, suffered any injury to his business or property by reason of any alleged conspiracy to exclude listed securities from the NASDAQ **[1011]** system at the start-up, and

The Court is of the opinion that reasonable minds could not differ otherwise.

Now, as to the conspiracy to ignore listed securities on the NASDAQ system, the Court is of the opinion that:

There is no evidence of any conspiracy by the named Defendants in these two causes to ignore listed securities on the NASDAQ system, so there may be evidence that individual members of the Defendant stock exchanges have ignored listed securities on the NASDAQ system.

There is no evidence as to the ignoring of the listed securities on the NASDAQ system, there is no evidence linking their conduct with any conspiracy among these named defendants.

Further, in order to recover under the Antitrust laws for this alleged conspiracy, Plaintiffs must show injury to one's business or property.

The Court feels that there has been a failure to show any such injury.

As to Count II of Civil Action 3-4361, regarding the Board of Governors, the manner in which the Board of Governors is constituted, the **[1012]** Court is of the opinion that the Defendant, the National Association of Securities Dealers, and Shearson, Hammill—I would like to amend that statement.

There is no evidence that the Defendant National Association of Securities Dealers and Shearson, Hammill have engaged in any conspiracy to exclude listed securities from the NASDAQ system, in violation of any NASD rules and regulations, or any conspiracy to dominate NASD members who are not members of the national exchanges.

Further, the Court is of the opinion that there is no evidence that the rules and regulations of the NASD, including the by-laws, providing for the election of the Board of Governors, is violative of any antitrust laws.

Therefore, the Court is of the opinion that the Defendants' motions for instructed verdict should be sustained.

* * * * * * * *

APPENDIX D-1

Sherman Antitrust Act, 15 U.S.C.

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine

not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282. (Emphasis added.)

APPENDIX D-2

Section 4 of the Clayton Act, 15 U.S.C.

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

APPENDIX D-3

Rule 23. Class Actions

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions af-

fecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) **Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) **Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966.

Supreme Court, U. S.
FILED
AUG 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-135

SHUMATE & COMPANY, INC., *et al.*,

Petitioners,

v.

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., and SHEARSON, HAMMILL & COMPANY, INC.,

Respondents.

SHUMATE & COMPANY, INC., *et al.*,

Petitioners,

v.

AMERICAN STOCK EXCHANGE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

ROBERT A. BICKS
1 Chase Manhattan Plaza
New York, N. Y. 10005
Attorney for Respondents National Association of Securities Dealers, Inc. and Shearson, Hammill & Company, Inc.

ROBERT B. FISKE, JR.
1 Chase Manhattan Plaza
New York, N. Y. 10005
Attorney for Respondent American Stock Exchange, Inc.

WILLIAM ELDRED JACKSON
BRISCOE R. SMITH
1 Chase Manhattan Plaza
New York, N. Y. 10005
Attorneys for Respondent New York Stock Exchange, Inc.

Of Counsel:
BREED, ABBOTT & MORGAN
DAVIS POLK & WARDWELL
MILBANK, TWEED, HADLEY & MCCLOY
LLOYD J. DERRICKSON
1735 K Street N.W.
Washington, D. C. 20006

TABLE OF CONTENTS

	PAGE
Opinion Below	2
Questions Presented	3
Statement of the Cases	3
The Securities Markets	4
The NASDAQ System	4
Shumate's Claims	5
The Alleged Conspiracy to Exclude Listed Stocks	6
The Alleged Conspiracy to Ignore Listed Stocks	8
The Directed Verdict and Affirmance by the Court of Appeals	8
Reasons for Denying the Writ	11
1. The Court of Appeals Acted in Accordance With Decisions of This Court in Requiring Proof of Antitrust Injury to Petitioners	11
2. The Court of Appeals Correctly Held That Plaintiff Failed to Proffer Proof of Injury	14
3. The Class Action Decision of the District Court, and the Affirmance by the Court of Appeals, were Correct and do not Present Any Issue for Review by This Court	15
Conclusion	17

PAGE

Table of Authorities

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946) 14

Dailey v. Quality School Plan, Inc., 380 F.2d 484 (5th Cir. 1967) 12

Hawaii v. Standard Oil Co., 405 U.S. 251 (1972) ... 13

Hobart Bros. Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894 (5th Cir.), *cert. denied,* 412 U.S. 923 (1973) 14

Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969) 16

Katz v. Carte Blance Corp., 496 F.2d 747 (3d Cir.), *cert. denied,* 419 U.S. 885 (1974) 16

Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) 13

Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) 12

Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555 (1931) 14

Winckler & Smith Citrus Prods. Co. v. Sunkist Growers, Inc., 346 F.2d 1012 (9th Cir.), *cert. denied,* 382 U.S. 958 (1965) 12

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 12

Securities Exchange Act of 1934:

15 U.S.C. § 78f 3

15 U.S.C. § 78o-3 3

Section 4 of the Clayton Act:

15 U.S.C. § 15 ..... 9, 12

3B J. W. Moore, *Federal Practice* ¶ 23.50 (2d ed. 1974) 16

IN THE

Supreme Court of the United States

October Term, 1975

No.

SHUMATE & COMPANY, INC., *et al.*,

Petitioners,

v.

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., and SHEARSON, HAMMILL & COMPANY, INC.,

Respondents.

SHUMATE & COMPANY, INC., *et al.*,

Petitioners,

v.

AMERICAN STOCK EXCHANGE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

The Court of Appeals affirmed a directed verdict by the District Court dismissing petitioners' complaints for treble

damages on the ground that petitioners failed to introduce evidence of antitrust injury, as required by Section 4 of the Clayton Act, to raise a jury question. The Court also held that the District Court had not abused its discretion in refusing to allow the cases to proceed as class actions on the ground that independent questions of whether each purported class member suffered injury predominated over common questions and, therefore, that the difficulties likely to be encountered in maintaining the cases as class actions outweighed the benefits.

Despite the total absence of evidence in the record of any injury resulting from either of the two antitrust conspiracies alleged in the complaints, petitioners now claim that defendants' conduct constituted *per se* violations of the antitrust laws and that it was not necessary for petitioners to offer any evidence that they had suffered injury. Even if petitioners' wholly unsupported assertions of *per se* violations be accepted for the sake of argument—and we submit that they should not—petitioners' assertion that plaintiffs in *per se* cases need not prove injury to themselves (as distinguished from injury to competition in general) is manifestly incorrect, and is contrary to the express provisions of Section 4 of the Clayton Act and to the uniform decisions of this Court.

None of the issues presented in the Petition falls within any of the categories specified in Supreme Court Rule 19; none is an appropriate issue for invoking the certiorari power of this Court.

Opinion Below

The opinion of the Court of Appeals (Pet. App. at A-1 to A-19) has been officially reported at 509 F.2d 147 (5th Cir. 1975).

Questions Presented

1. May plaintiffs recover treble damages under Section 4 of the Clayton Act for alleged violations of the antitrust laws where they have failed to introduce any evidence establishing that defendants' alleged conduct caused any injury to themselves? (This question corresponds to petitioners' Question 1.)

2. Did the District Court, as affirmed by the Court of Appeals, abuse its discretion in holding that the independent questions of damage to each individual member of the class predominated over common questions and therefore that the difficulties likely to be encountered in maintaining these cases as class actions outweighed the benefits? (This question corresponds to petitioners' Question 2.)

Statement of the Cases

Petitioners are Shumate & Company, Inc., a Dallas brokerage firm, and Gaston A. Shumate, its President and sole stockholder.* Respondents are the New York Stock Exchange, Inc. ("NYSE"), The American Stock Exchange, Inc. ("AMEX"), the National Association of Securities Dealers, Inc. ("NASD"), and Shearson, Hammill & Company, Inc. The New York and American Stock Exchanges are national securities exchanges registered with the Securities and Exchange Commission pursuant to § 6 of the Securities Exchange Act of 1934, 15 U.S.C. § 78f. The NASD is a "national securities association" established and regulated pursuant to the Maloney Act (15 U.S.C. § 78o-3) and is primarily engaged in regulatory activities in connection with the over-the-counter ("OTC") market.

* In this brief, petitioners will be referred to collectively as Shumate and individually as Mr. Shumate and Shumate & Company.

Its members include virtually all broker-dealers involved in the general securities business. Shumate & Company is a member of the NASD, but not of either exchange.

The Securities Markets

There are two basic markets for the purchase and sale of securities: the exchange markets and the OTC market. The stock exchanges are central market places where all potential buyers and sellers of securities listed on those exchanges can be brought together, through their brokers, to auction their securities. Extensive information on trading in the exchange markets is available so the public can see the current bid and asked quotations for all listed securities and the actual prices and number of shares involved in trades of those securities during each business day.

In the OTC market, unlike the exchange markets, there is no central market place for trades. Trades take place in the offices of brokers as a result of communication by telephone between them. One segment of the OTC market is called the "third market." It consists of trades off the floors of the exchanges in securities which are listed on the exchanges. Apart from transactions in listed securities currently reflected on the recently introduced composite tape, actual trades in the OTC market generally are not reported to the public; the only information which a prospective purchaser or seller of an unlisted security has available are bid and asked prices quoted by dealers who are "making a market" in the stock in question.

The NASDAQ System

In response to a requirement by an amendment to the Securities Exchange Act of 1934 that the NASD provide rules for dissemination of quotations on securities sold

otherwise than on national securities exchanges, the NASD employed Arthur D. Little, Inc. in 1967 to examine the feasibility of a national automated quotation system for OTC trading. The next year, the NASD hired Bunker-Ramo Corp. to construct the system, which was named the National Association of Securities Dealers Automated Quotations System (NASDAQ). Under the system, a NASDAQ machine, which somewhat resembles a television screen, has been made available, by subscription, to any member of the NASD who is willing to pay for it. The machines are designed to electronically display quotations for OTC securities included in the system. Securities may be included in the system upon application by two or more brokerage firms who are market makers in the stock. Service is available at three levels: Level 1 gives the viewer representative bid and asked quotations in a stock; Level 2 gives the viewer bid and asked quotations of all market makers in the stock; Level 3 allows a broker to enter his own quotes as a market maker.*

Shumate's Claims

In the two cases before the Court on Shumate's petition, Shumate alleges two conspiracies among the defendants: (1) a conspiracy to exclude securities listed on the stock exchanges from the NASDAQ system during the start-up period of the system—from February 8, 1971 until April 5, 1971; and (2) a conspiracy to ignore quotations of listed securities once listed securities were included on NASDAQ beginning on April 5, 1971.**

---

* Prior to NASDAQ, quotations for OTC securities were available primarily through a service known as the "National Daily List" or Pink Sheets, a daily periodical which publishes quotes in OTC stocks, and through publication in various financial journals.

** This second conspiracy claim was added by an amendment to the Complaints pleaded only five weeks before trial began in October 1973.

The Alleged Conspiracy to Exclude Listed Stocks

With respect to the asserted conspiracy among the defendants to exclude listed securities from NASDAQ at start-up, the evidence in the record showed the following: although the NASDAQ committee of the NASD voted against the inclusion of listed stocks in NASDAQ, the Board of Governors of the NASD* made an initial decision in June of 1970 to include listed stocks in NASDAQ, despite concern about operational and regulatory problems, because of the Board's feeling that the SEC wanted listed stocks included. In September, Ralph Saul, then President of the Amex, visited Hamer Budge, the Chairman of the SEC, to express his concern as to the impact which inclusion of listed stocks in NASDAQ might have upon the securities markets. The Chairman told Mr. Saul to write a letter outlining his views. Mr. Saul wrote such a letter, opposing the inclusion of listed stocks at the start-up, pending further study of the impact of such a decision on the exchange markets. Within a few days of that letter—and without any consultation with Mr. Saul—Robert Haack, then President of the NYSE, wrote a letter to the SEC, opposing the initial inclusion of listed stocks on grounds somewhat different from those expressed by Mr. Saul. Gordon Macklin, President of the NASD, met with Chairman Budge on October 20, 1970 to express once again the NASD's own concern—as reflected in the decision of the NASDAQ committee—regarding inclusion of listed stocks in NASDAQ. On October 22, Chairman Budge telephoned Macklin and said that the SEC would approve not including listed stocks in NASDAQ at start-up. Accordingly, on the following day, October 23, 1970, the NASD decided to begin

* The membership of the NASD in November of 1966 authorized the Board of Governors to establish the necessary rules and operating procedures for the system.

operation of NASDAQ without listed stocks, but to continue to study the question of inclusion of listed stocks with a view to resolving the problems which such inclusion might engender.*

NASDAQ began operations on February 8, 1971, with quotations only for nonlisted OTC securities. Eight weeks later, on April 5, 1971, the NASD, on a test basis, included each of the 32 listed stocks which qualified for inclusion in NASDAQ under the NASDAQ requirements for nonlisted securities, including the only two stocks for which Shumate had requested listing.** After expiration of the test period, the NASD, with SEC approval, made all listed stocks eligible for inclusion on NASDAQ. Any listed security is included when, as with an unlisted security, a specified number of market makers has properly requested its inclusion. Thus, any security will be listed on NASDAQ only as a result of the decisions of the requisite number of individual firms to make a market in that security. None of the defendants has any control over those decisions.

In short, it is undisputed that at all times since April 5, 1971, eight weeks after start-up, listed securities have been

* The decision to begin operation of NASDAQ without listed securities, just as the initial decision in June, 1970 to include listed stocks, was made by the Board of Governors of the NASD, the membership of the NASD having delegated to the Board authority to establish rules and operating procedures for NASDAQ. Accordingly, there was no need for the Board of Governors to request approval by the membership of the decision to begin without listed stocks, especially since the effect of the decision was to delay inclusion of listed securities for only eight weeks.

** Shumate concedes at page 8 of the Petition that the listed securities included in the test were all of the listed securities "for which inclusion [in NASDAQ] had theretofore been requested."

eligible for inclusion in NASDAQ upon the same terms and conditions as nonlisted securities. It is equally undisputed that Shumate & Company, Inc. did not even attempt to obtain a NASDAQ machine until August 1972 and did not actually install such a machine in its office until January 1973—more than 20 months after listed stocks were first included in NASDAQ.

The Alleged Conspiracy to Ignore Listed Stocks

Shumate introduced no evidence of a conspiracy among the defendants to ignore quotations for listed securities once listed securities were included on NASDAQ on April 5, 1971. The proof by which Shumate purported to address this issue was limited essentially to the testimony of a few brokers that the NASDAQ machine is not interrogated by them before making a trade on the exchange floor. There was no testimony, however, to establish that the brokers' conduct was in any way improper, much less that it was part of any conspiracy among these individuals or among the firms by whom they were employed. Most important, there was absolutely no testimony indicating that any of this was by reason of any act of either exchange or the NASD—let alone as a result of a conspiracy among them.*

The Directed Verdict and Affirmance by the Court of Appeals

At the close of plaintiffs' case, the District Court directed a verdict against Shumate with respect to both of

* To the extent Shumate's proof provided any explanation for the fact that certain brokers did not interrogate NASDAQ for quotes on listed stocks before trading on the exchanges, it lay in the testimony that there were at times technical and functional difficulties with the NASDAQ system, and that NASDAQ quotes, good in the best of times for only 100 shares, would disappear from the screen in the face of bad news.

the alleged conspiracies. The District Court found that Shumate had failed to introduce any substantial evidence that it had been injured in "its business or property by reason of anything forbidden in the antitrust laws" within the meaning of Clayton Act § 4, 15 U.S.C. § 15. While the District Court found that "there may be evidence upon which reasonable minds could differ" as to the existence of a conspiracy to exclude listed stocks during the start-up period (although no proof had been offered of any injury from any such conspiracy), the District Court found that Shumate had failed to introduce any evidence to establish the existence of a conspiracy to ignore quotations of listed securities on NASDAQ.

The Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court. The Court of Appeals held that Shumate had totally failed to provide sufficient evidence of injury with respect to either of the two alleged conspiracies.*

Shumate alleged basically four types of injury: (1) an increase in third market trading volume less than Mr. Shumate had anticipated under NASDAQ, (2) lower annual profits resulting from an inability to attract new salespersons, (3) the loss of commissions on orders placed in April and May of 1972 by a retirement fund, and (4) the loss in August 1973 of a discretionary account for which Shumate & Company was paid an annual fee.

With respect to the alleged conspiracy to exclude listed securities from NASDAQ at start-up (the only one on

* The Court of Appeals found it unnecessary to reach the questions of whether Shumate had provided sufficient evidence of either of the two alleged conspiracies to reach the jury on the conspiracy questions. The recitation of the facts of the case by the Court of Appeals makes it apparent, however, that the Court of Appeals believed proof of both alleged conspiracies to be totally lacking. (See Pet. App. at A-2 to A-4).

which the District Court found sufficient evidence of conspiracy to go to the jury), the Court of Appeals rejected Shumate's four alleged items of injury as totally unrelated:

> "None of these elements of injury is related to the ineligibility of listed stocks for the period where such stocks were not generally eligible, February 8, 1971, until October 18, 1971. Shumate did seek to have two listed securities placed on NASDAQ in the spring of 1971, in order to become a market maker in them, and they were included during the test period. But once they were listed, nothing indicates that Shumate attempted to make a market in them using NASDAQ. In fact, Shumate could not have used NASDAQ to become a market maker in those securities as he did not have a NASDAQ terminal in his office until early 1973. It is clear that Shumate presented nothing in the record, not even his own unsupported conclusions, to demonstrate any injury during the period that listed securities were excluded pursuant to the alleged conspiracy. In such a situation with *no* evidence of injury presented, the district court was undoubtedly correct in directing a verdict against Shumate on the first count." (Pet. App. at A-8).

With respect to the alleged conspiracy to ignore quotations of listed securities on NASDAQ, which the District Court dismissed for the additional and independent reason that there was insufficient evidence of conspiracy to present a jury question, the Court of Appeals rejected Shumate's four alleged items of damage as totally unsupported by any relevant data. (Pet. App. at A-8 to A-12).

As to the class action issue, the Court of Appeals held that "the district court was within its discretion in deciding that common issues do not predominate" (Pet. App. at A-13).

Reasons for Denying the Writ

1. The Court of Appeals Acted in Accordance With Decisions of This Court in Requiring Proof of Antitrust Injury to Petitioners.

Stripped of complaints about evidentiary rulings, all of which were rejected by the Court of Appeals and none of which is urged in the Petition as a basis for granting a writ of certiorari, petitioners' argument consists of an assertion, wholly unsupported by the record, that the conduct of defendants with respect to NASDAQ constituted *per se* violations of the Sherman Act and, therefore, according to petitioners, injury to them as a result of defendants' conduct must be presumed and need not be proven. Essentially, and quite understandably, petitioners have abandoned their contention in the courts below that they presented sufficient *evidence* of injury to present a jury question. Instead petitioners now, for the first time in this case, contend that they were not required to introduce any evidence of injury—that they were entitled to recover treble damages under Section 4 of the Clayton Act without introducing any evidence that they were injured by reason of an antitrust violation by defendants.

Petitioners' position is flatly contradicted by the express words of Section 4 of the Clayton Act and by the decisions of this Court and other federal courts. Indeed, petitioners have not cited a single decision of this or any other court, or any authority of any kind, in support of their position.

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> "*Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws* may sue therefor . . . and shall recover threefold the damages by him sustained . . . ." [Emphasis supplied.]

This Court, as well as other federal courts, has interpreted this section as requiring that an antitrust plaintiff must prove the fact of injury to him as an essential element of his claim for relief. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Dailey* v. *Quality School Plan, Inc.*, 380 F.2d 484, 487 (5th Cir. 1967); *Winckler & Smith Citrus Prods. Co.* v. *Sunkist Growers, Inc.*, 346 F.2d 1012, 1014 n. 1 (9th Cir.), *cert. denied*, 382 U.S. 958 (1965). This Court stated the rule in the *Zenith* case, *supra* at 126-27:

> "Section 4 of the Clayton Act required that Zenith show an injury to its 'business or property by reason of anything forbidden in the antitrust laws.' If Zenith's failure to enter the English market was attributable to its lack of desire, its limited production capabilities, or to other factors independent of HRI's unlawful conduct, Zenith would not have met its burden under § 4."

As *Zenith* and other cases demonstrate, moreover, the requirement that a plaintiff prove injury as a prerequisite to recovery applies with equal force to cases involving *per se* violations of the antitrust laws. In *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co., supra*, for example, this Court, in reversing the dismissal of a complaint which alleged the same type of conduct found to be a *per se* viola-

tion in *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959),* made it clear that proof of injury to the plaintiff is an essential element of a private treble damage action:

> "Therefore, to state a claim upon which relief can be granted under that section [Sherman Act § 1], allegations adequate to show a violation and, *in a private treble damage action, that plaintiff was damaged thereby are all the law requires.*" 364 U.S. at 660. [Emphasis supplied.]

Petitioners' argument that they are not required to prove injury to themselves is also contrary to the principle that not only must an antitrust plaintiff prove injury but he must prove injury which was a direct result of the claimed antitrust violation and not merely incidental. As this Court stated in *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263 n. 14 (1972):

> "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." [Citing decisions in ten Courts of Appeals.]

It is clear, therefore, that the Court of Appeals below acted in conformity with uniform decisions of this Court

---

* Petitioners quote from *Klor's* at page 30 of the petition. The issue in *Klor's* to which the quote was addressed by this Court was whether it was necessary for the plaintiff in that case to allege injury to the general public in addition to injury to the plaintiff. This Court held that allegation of public injury was not necessary in *per se* cases. However, it was conceded by the defendants in *Klor's*, upon their motion to dismiss, (359 U.S. at 209) that plaintiff itself had been damaged by defendants' conduct.

in requiring that petitioners prove injury to themselves as an essential element of their claim for relief under Section 4 of the Clayton Act. Petitioners' suggestion at page 18 of the Petition that the questions raised by the Petition have not yet been decided by this Court is soundly rebutted by the cases.

2. The Court of Appeals Correctly Held That Plaintiff Failed to Proffer Proof of Injury.

Petitioners have not asked this Court to review the determinations by the District Court and Court of Appeals below that the evidence offered by petitioners was plainly insufficient to prove injury. Any attempt to seek review of these factual determinations, however, would be unavailing; the factual determinations of the courts below were correct and do not raise any issues of sufficient importance to justify certiorari.

Shumate failed to support any of the four claims of injury with any "relevant data." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946); *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Hobart Bros. Co.* v. *Malcolm T. Gilliland, Inc.*, 471 F.2d 894 (5th Cir.), *cert. denied*, 412 U.S. 923 (1973). First, all four of the claims were totally unrelated to the alleged conspiracy to exclude listed securities from NASDAQ at start-up. With respect to the alleged conspiracy to ignore listed securities on NASDAQ, Shumate's claim of a lesser increase in trading volume in the third market than anticipated under NASDAQ was based upon Mr. Shumate's conclusory statement alone; Shumate introduced neither projections of the volume expected from NASDAQ nor any records of the third market trading of Shumate & Company. Shumate's claim of inability to hire salespersons was never connected by evidence to the alleged conspiracy to ignore quotations for listed securities. There was no testimony of any prospective salespersons that they chose not to work for Shumate & Company because of the failure of the third market to develop more fully with the commencement of NASDAQ.

Shumate's claim that the alleged conspiracy to ignore listed securities on NASDAQ caused Shumate & Company to lose commissions because of inability to execute specific orders for the New York State Teachers' Retirement System in April and May 1972 was clearly frivolous. Shumate was not a subscriber to NASDAQ in April or May 1972, Shumate & Company did not attempt to execute any of the orders with the aid of NASDAQ and there was no proof introduced that the securities for which the orders were placed were even on the NASDAQ system. Finally, Shumate introduced no evidence that the loss of a $25,000 annual fee in August of 1973 had anything to do with NASDAQ other than Mr. Shumate's unsupported assertion that one of the proximate reasons for losing the account was the failure of NASDAQ to develop as it should have. No data or testimony relating to the operation of the account and no correspondence or testimony from the client were introduced to support Mr. Shumate's bare allegation.

The decision of the Court of Appeals was clearly correct and neither the legal nor factual conclusions of that Court raise issues calling for review by this Court.

3. The Class Action Decision of the District Court, and the Affirmance by the Court of Appeals, were Correct and do not Present Any Issue for Review by This Court.

The District Court rejected Shumate's request that these actions be allowed to proceed as class actions. In a decision rendered in advance of trial, the District Court

reasoned that individual questions of whether each purported class member suffered injury, questions essential to establishing the liability of defendants with respect to each class member, predominated over common questions and, therefore, that "the difficulties likely to be encountered in the management of this case as a class action outweighed the benefits. . . ." (District Court Class Action Decision, April 26, 1973). The Court of Appeals, correctly concluding that the District Court's decision could be upset only for an abuse of discretion, found no such abuse (Pet. App. at A-13; See *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974); *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969); 3B J. W. Moore, *Federal Practice* ¶ 23.50 at 23-1104 to -1105 (2d ed. 1974)).

Petitioners' argument for invoking the certiorari power of this Court with respect to the class action determination is based upon their argument, shown to be erroneous in Point 1 of this brief (*supra*, pp. 11-14) that individual plaintiffs need not prove injury to recover treble damages under Section 4 of the Clayton Act in the circumstances of this case. (Question Presented number 2, Petition, pp. 2-3.) Petitioners have pointed to no reason in Supreme Court Rule 19 or anywhere else calling for review by this Court of the exercise of discretion by the District Court and affirmance by the Court of Appeals, and there is none.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT A. BICKS
1 Chase Manhattan Plaza
New York, N.Y. 10005
Attorney for Respondents National Association of Securities Dealers, Inc. and Shearson, Hammill & Company, Inc.

ROBERT B. FISKE, JR.
1 Chase Manhattan Plaza
New York, N.Y. 10005
Attorney for Respondent American Stock Exchange, Inc.

WILLIAM ELDRED JACKSON
BRISCOE R. SMITH
1 Chase Manhattan Plaza
New York, N.Y. 10005
Attorneys for Respondent New York Stock Exchange, Inc.

Of Counsel:
BREED, ABBOTT & MORGAN
DAVIS POLK & WARDWELL
MILBANK, TWEED, HADLEY & MCCLOY
LLOYD J. DERRICKSON
1735 K Street N.W.
Washington, D.C. 20006